PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

COLLATION OF EVIDENCE OF THE COMMISSIONER OF THE ICAC, MR IAN TEMBY QC ON GENERAL ASPECTS OF THE COMMISSION'S OPERATIONS

MONDAY 14 OCTOBER, 1991

PARLIAMENT HOUSE, SYDNEY

COMMITTEE ON THE

INDEPENDENT COMMISSION AGAINST CORRUPTION

MEMBERS

Mr M J Kerr, MP (Chairman) (Lib)
The Hon D J Gay, MLC (Vice - Chairman) (Nat)
The Hon J C Burnswoods, MLC (ALP)
Mr B J Gaudry, MP (ALP)
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Mr A A Tink, MP (Lib)
Mr J H Turner, MP (Nat)
Mr P R Nagle, MP (ALP)
The Hon S B Mutch, MLC (Lib)

STAFF

Ms R Miller, Clerk to the Committee
Mr D M Blunt, Project Officer
Miss G Penrose, Assistant Committee Officer

FUNCTIONS OF THE COMMITTEE

INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

"64 (1) The functions of the joint Committee are as follows:

(a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee -

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint."

CHAIRMAN'S FOREWORD

As part of its role in monitoring and reviewing the exercise by the Commission of its functions, the former Committee established a regular pattern of public hearings with the Commissioner of the ICAC, Mr Ian Temby QC. The current Committee has resolved to continue this practice.

These hearings enable Committee members to question the Commissioner about matters of concern, issues arising from Commission reports and general aspects of the Commission's operations. By conducting these hearings in public and subsequently producing a Collation of the questions and answers, the Committee hopes to assist in informing the public about the ICAC.

As with the public hearings conducted by the former Committee, Mr Temby was provided with a series of questions on notice. The Committee received written answers to these questions in advance of the hearing. These written answers were tabled at the hearing and Committee members had the opportunity to ask questions without notice.

It should be noted that this Collation represents an edited version of the minutes of evidence of the hearing. In some cases the order in which questions were asked has been altered to enable the questions and answers to be categorised under appropriate subject headings, for easy reference. Furthermore, there have been some deletions from the text and some further written advice from the ICAC has been incorporated where appropriate.

M J Kerr MP
Chairman

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CHAIRMAN'S OPENING STATMENT:

Q: At the outset it would be helpful for me to outline the purpose of this morning's hearing and make some preliminary observations. The Parliamentary Joint Committee on the Independent Commission Against Corruption is a standing Committee appointed under the provisions of the Independent Commission Against Corruption Act. The functions of the Committee are set out in section 64 of the Act, copies of which are available at the door. The primary function of the Committee is to monitor and review the exercise by the Commission of its functions. In order to fulfil that monitoring and review role the former committee established a pattern of regular six-monthly public hearings with the Commissioner. The present Committee is continuing that practice and this is the first such monitoring and review hearing conducted by the present Committee. This hearing will enable Committee members to raise questions arising from the Commission's recently tabled 1991 Annual Report as well as issues of concern more generally.

A new procedure being adopted for this hearing is the provision by the ICAC of written answers to questions on notice, which have now been tabled and distributed. Committee members have advised that there are a number of issues arising from these written answers which they will be pursuing with Mr Temby this morning. These include firearms, effect of suppression orders, media relations, rights of ICAC employees, performance indicators and the Annual Report.

Gibson Inquiry

Before turning to my own observations about those written answers and the 1991 Annual Report, I want to make a few comments about the Committee's current inquiry into the matters raised by Paul Gibson MP last month. The Committee has received the following reference from both Houses of Parliament in relation to the matters raised by Mr Gibson:

> That, in view of the comments on the Independent Commission Against Corruption made by the Honourable Member for Londonderry in the Legislative Assembly on 12 September 1991, the Parliamentary Joint Committee on the ICAC inquire into and report to both Houses upon:
>
> 1 The procedures and structures for the management and control of Independent Commission Against Corruption investigations and operational activities;
>
> 2 The relationship between the Independent Commission Against Corruption and other agencies involved in investigating or prosecuting corruption;

3 The Witness Protection facilities available to those assisting the Independent Commission Against Corruption with its investigations.

In carrying out the Inquiry the Committee shall have regard to any matters that may prejudice pending criminal proceedings as confidential matters which, accordingly, should be dealt with in private.

In conducting the Inquiry the Committee shall have due regard to the terms of S.64(2) of the Independent Commission Against Corruption Act 1988.

In accordance with the instruction in the reference about confidentiality, the Committee has been taking evidence in relation to this matter in private. These private hearings are in relation to the first term of reference, that is, the procedures and structures for the management and control of ICAC investigations and operational activities. The Committee intends to produce a report on this aspect of the inquiry as soon as possible and I would emphasise that this would be a public report. The Committee then will be examining the other matters identified in the reference from Parliament. It is intended that these matters will be dealt with in public, and public hearings are scheduled for Wednesday 6th November, on the ICAC's relationship with other agencies; and on Thursday 7th November on witness protection.

1991 Annual Report - Costing of Investigations

Returning to the subject of today's hearing, I should like to make the following preliminary comments. In relation to the Commission's 1991 Annual Report, first I should like to express my strong support for the initiative which the Commission has taken in costing investigations. When Mr Temby appeared before the previous Committee earlier this year he tabled the formula which was to be used for the costings. On page 116 of the Annual Report one can see the costing of each completed investigation which has resulted in a report to Parliament. This is a major initiative and will be of great assistance in evaluating the Commission's effectiveness.

Operations Strategy

Second, I would draw attention to the Operations Strategy which appears on pages 9 to 15 of the Annual Report. This strategy is a considerable development on the one contained in the last annual report. I am particularly impressed by the new emphasis on proactive investigations and the targeting of institutionalised corruption which is mentioned on page 15.

Performance Indicators

In relation to the written answers to the questions on notice I would draw attention to question 5.1. I am pleased to see that the Commission is taking steps to develop performance indicators. This no doubt will be a difficult task as many of the more obvious indicators of performance, such as the number of prosecutions, are not all that helpful. However, it is a task that needs to be tackled if the work of the Commission is to be properly and objectively evaluated. Indeed it is the Committee's intention to conduct a comprehensive review of the ICAC during 1993, that is, during Mr Temby's last year as Commissioner. That is all I would like to say at this stage. Before moving to questions without notice I ask Mr Temby whether he has anything he wants to add to the written answers or any preliminary comments in relation to the Annual Report?

MR TEMBY'S OPENING STATMENT:

A: Thank you Mr Chairman. My preliminary comments are largely limited to providing an update on the Annual Report, because some time has gone past since it was prepared.

Corruption Prevention

In relation to corruption prevention, the report mentions two matters which were then complete. The Commission is actively involved in monitoring the extent and effectiveness of implementation of its recommendations. I would wish to respectfully suggest that the Committee might at some time in the future, perhaps 12 months down the track, look at the possibility of undertaking an investigation into the extent to which departments and agencies have followed Commission advice in relation to the corruption prevention area, what we call systems improvement.

I am sanguine as to the prospects of there being a high extent to which the recommendations are followed. I would wish to make clear that it is not for us to insist that departments or agencies follow our advice, but given that there is a lot of discussion before the corruption prevention project reports are brought down, it would be disappointing if the advice given were entirely or very largely ignored. There could well be a role for the Committee in seeing to what extent the Commission's advice has been followed and has proved to be useful or otherwise.

Of the four projects under way as at 30th June, three are now well advanced. They relate to cash handling in public hospitals, boat moorings, and disposal by local councils of vehicles. We have commenced one further formal project, which has to do with the secondary employment of police officers. That was commenced with the support, indeed the strong support, of the Police Service.

Committee members will probably be aware that the Premier recently directed that all State Government agencies develop a code of conduct to be published in their Annual Reports for 1992. That has increased demands upon the Commission for assistance in this area. Recently we organised, jointly with the Office of Public Management, a series of workshops on code of conduct development. There have been three such workshops held during September and October *(and a fourth to be held before the end of October)*. Some 40 agencies have participated. It is likely that another series will be held before too much more time passes.

Public Education

In the public education area the Commission has participated in Agquip at Gunnedah, at the opening of Carnivale, and has commenced a new campaign aimed at people who come from non-English speaking backgrounds. We call that our multicultural outreach campaign. It was launched in Blacktown on 1st October and elements of it include the publication of our basic information brochure in 12 major community languages. We are running radio spots over a couple of months on public radio and on radio 2EA, and we are making speakers available at seminars.

Investigations

In relation to investigations, as at 30th June the total number commenced was 36. Since then a further nine formal investigations have been commenced, of which two have been completed. We have finalised the hearings on the South Sydney and Kyogle matters, and I am assured by the Assistant Commissioner in charge of those references that the report writing process is well advanced.

Prosecutions

Finally, and perhaps most significantly, a lot of progress has been made on the prosecutions front. I should like to present and if possible have tabled a schedule which updates the information that has already been provided to the Committee.

If I could just wait until copies of that are before the Committee members and I could then say something by way of explanation, if that is convenient.

PROSECUTIONS OTHER THAN COMPLETED MATTERS

5 matters completed - refer to answer to question 6.1.

CHARGES LAID

Waverley	8 charges laid against 2 people (4 - 4)
Tweed	20 charges laid against 8 people 3 persons committed for trial on 1 charge each 4 matters involving 5 people still under consideration by DPP or not yet charged
SRA/Laurel	45 charges laid against two people (23 - 22)
Flemington Markets	19 charges laid against 7 people
Yarra	2 charges laid against 2 people (does not include Henwood and Budworth who are completed)
Azzopardi	State DPP - 4 charges against 1 person Charges against 2 police still to be laid Commonwealth DPP - no charges laid yet

TOTAL CHARGES LAID: 98 against 22 people

STILL UNDER CONSIDERATION OR CHARGES NOT LAID

RTA	No charges yet laid 11 potential charges against 11 people
Police	6 charges, advised by DPP, to be laid
Homfray Carpets	Not to proceed as key witness died
Sutherland Licensing Police	1 potential accused person

A: The written answers to questions show there have been seven charges carried through to completion in the prosecution process against five people and all of them were dealt with successfully. The schedule in the table shows there have been laid a total of 98 charges against 22 people in addition to those already completed, and I can inform the Committee that the outstanding matters which are expected to proceed involve at least 18 charges against a further 13 individuals, on which basis it is anticipated that well before the end of the year a total of 123 charges against 40 people will have been or will then be before the courts. Some of these matters in the schedule Committee members will be well aware of. We have at long last seen charges laid in the Waverley matter; the Tweed matter is well advanced but there are still some charges to be laid; Yara is the tow truck matter and in addition to the two police officers already prosecuted, there are charges against two other people which have been laid, and you know about the Azzopardi matter.

In relation to charges laid, the Committee will not I think before now have heard of the State Rail Authority matter we call Laurel. There have been laid a total of 45 charges against an employee, or perhaps by now a former employee, of that organisation and his wife, and they are fraud related offences of some seriousness. You would not know about the Flemington markets matter. Charges have been laid against seven security officers working at Flemington markets in relation to the theft of produce. In relation to the matters still under consideration, the Roads and Traffic Authority matter you know about; what is called "Police" is a particular investigation and the six charges are against a particular police officer, so I do not want to give the impression that is some sort of generic category. In the Homfray Carpets matter, Committee members who have read the report will remember that Goodall, who was central was then seriously ill. He has since died. He has, accordingly, been removed both as a potential accused and as a witness against others, and late last week we received advice from the Director of Public Prosecutions, with which we agree, that no charges should be proceeded with so far as others are concerned.

All else that needs to be said concerning prosecutions can be summarised in two points. The first is that the rate of prosecution or conviction is still not in our view a good measure of success. Far more important are policy and process changes and also attitudinal changes both inside and outside the public sector. Secondly, there will doubtless be some cases in which not guilty verdicts are returned. When that happens it should not be seen as some indication of failure. Committee members will, I am sure, be aware that most of these prosecutions are or will be difficult matters. They are quite tough cases to carry through the prosecution process.

Use of Commission Transcript in Prosecutions

Finally may I make a comment concerning the possible use of Commission transcript in the prosecution process which is dealt with on page 70 of the Report. The proposal that Commission transcripts should be available for use in the prosecution process has been the subject of at least a couple of critical comments. In view of the way that criticism has been couched, I rather think that the individuals who have spoken have been responding to questions without having actually read the Annual Report. Certainly they have not come to us for any further information. It needs to be stressed very strongly that what we are suggesting is merely a procedural change. We are not suggesting any change in the law so far as admissibility is concerned. The present rule is that you have to produce signed statements from prospective witnesses. For reasons we have sought to explain briefly in the Report, that is frequently difficult and sometimes literally impossible, to get people to actually sign those statements, and it always involves a lot of additional work.

What we have suggested is not that all of the evidence before the Commission should become admissible in a prosecution, which would be a legal nonsense, but rather that there be a process change so that Commission transcripts can be used rather than statements having to be obtained in each and every situation. On page 71 this appears:

> While this may involve careful consideration having to be given to the content of transcripts, and editing where appropriate, it would be more efficient than having to take fresh statements.

What is there being said is that doubtless if and to the extent transcripts were used in the prosecution process, there would be a need to go through and delete any inadmissible or occasional hearsay material. You would have to get rid of that stuff, but what remains is then sworn evidence which has or should be seen to have a standing above that of a mere statement made by a witness. So in summary we are suggesting a mere procedural change that will considerably facilitate the rapid and efficient despatch of business. We are not suggesting and have never suggested any change to the law so that evidence before us becomes admissible before courts, which would not be right.

CHAPTER ONE

FIREARMS

Questions on Notice

Q: 1.1 **Which ICAC officers are authorised to carry firearms?**

A: (a) Security officers, provided to the Commission by the Police Service.

(b) Seconded police officers, who have weapons issued by the Police Service.

(c) Commission investigators at all levels.

Q: 1.2 **What screening processes and training procedures does the Commission have in place in relation to ICAC officers authorised to carry firearms?**

A: Firearms may only be issued to officers by the Security Manager, in circumstances approved by the Director or Deputy Director of Operations, after investigators have undergone a theoretical and practical course and passed written and practical examinations. The training course was designed and is conducted by the NSW Police Service for the Commission.

Q: 1.3 **Why was it felt necessary for the ICAC to seek an exemption from the licensing requirements of the Firearms Act 1989?**

A: The Commission sought an exemption from the licensing requirements of the Firearms Act 1989 to permit Commission officers to carry firearms on rare occasions when they would need to protect their own personal safety and the safety of others, in situations such as witness protection, prisoner escort and perhaps the execution of some search warrants. Exemption from the licensing requirements, pursuant to regulation 95 of the Regulations to the Firearms Act 1989 and Schedule 6 to the Regulations, was chosen, rather than licensing of individual officers, because it was intended that the firearms be available to the Operations Department and assigned to individual officers when required and appropriate, rather than that all officers possess their own firearms.

Q: 1.4 Is the authority to carry firearms restricted to "on duty" or to "travel to and from duty"? If it includes "travel to and from duty" what precautions are in place for safekeeping of the weapons during off duty periods?

A: The exemption permits Commission officers to carry firearms during the course of their duty. The Security Manager is responsible for the security and issue of firearms. Apart from security officers, Commission staff carry firearms rarely.

Q: 1.5 It is the Committee's understanding that the situations in which NSW Police officers may use firearms in the course of duty are strictly limited to the following circumstances:

- **self defence;**
- **protection of other members of the community from danger and/or attack; and**
- **arrest of felons, known to have been involved in actual or threatened violence.**

(i) How many times have ICAC officers been required to:

- **protect themselves;**
- **protect members of the community from danger and/or attack; or**
- **arrest felons known to have been involved in actual or threatened violence?**

In each case please provide all relevant details, including any use of firearms by ICAC officers.

A: There have been no occasions when Commission officers have had to draw or use a firearm to protect themselves, and no occasions when Commission officers have been required to protect members of the community from danger or attack, or arrest felons.

Q: (ii) If no such incidents have occurred to date, what gives rise to the perceived need for ICAC officers to carry firearms?

A: It was perceived that Commission officers could be involved in activities where their personal safety could be endangered, such as witness protection activities, escorting prisoners and executing search warrants. It was on these three bases that the Commission made application to the Minister for Police for the exemption for Commission officers.

Q: 1.6 (i) What sort of firearms and what type of ammunition is carried by ICAC officers?

A: Firearm: Smith and Wesson 9 mm semi-automatic pistol model 69.

Ammunition: 9 mm hollow point semi-jacketed.

Q: (ii) **If ICAC officers are to be issued with 9 mm semi-automatic pistols, as reported, why is the Police issue Smith and Wesson .38 calibre revolver considered unsuitable/inadequate? Have any such inadequacies been brought to the attention of the Commissioner of the Police?**

A: The semi-automatic pistol was chosen for use by Commission officers rather than the revolver used by the NSW Police because the semi-automatic pistol is considered a safer weapon, having several safety mechanisms, and it is easier to train people in the use of the pistol.

Q: (iii) **If NSW Police officers seconded to the ICAC are to be issued with such firearms what reason is there for them to be armed differently to the Police officers seconded to organisations such as the National Crime Authority and State Crime Commission?**

A: NSW Police officers seconded to the Commission are not issued with Commission firearms. They use the firearms issued to them by the Police Service.

Q: 1.7 **A spokesman for the Commission was recently reported as saying that a regulation concerning ICAC officers carrying firearms brought the ICAC "into line with other law enforcement agencies". (See copies of articles attached).**

Has the spokesperson been quoted accurately? If so, upon what authority does the Commission see itself as a law enforcement agency?

A: The Commission officers were reported accurately but not completely. The term "law enforcement agency" does not have a precise legal or technical meaning, and was not used as such by the Commission officers. Other exemptions under Schedule 6 to the Firearms Regulations apply to some officers of the Department of Agriculture and Fisheries, the Department of Industrial Relations and Employment, the Department of School Education, the Forestry Commission of NSW, the National Parks and Wildlife Service, Pastures Protection Boards, the Water Board and the Zoological Parks Board, for the purpose of performing their duties and functions. The Commission has an investigative function and Commission officers are employed to perform that function. Investigation of some corrupt conduct may involve them in situations which require the carrying of firearms for their own or others' personal safety.

I . C A . C

SUN HERALD

14 JUL 1991

Have gun, will eradicate corruption

2. STAFF of the Independent Commission Against Corruption (ICAC) have been given the right to carry guns.

According to spokeswoman Roberta Baker the regulation giving ICAC personnel access to guns merely brings the ICAC "into line with other law enforcement agencies".

Oh really. Pray tell — when did the ICAC became "a law enforcement agency"?

As far as the general public is concerned, the ICAC is a body dedicated to ridding government departments and the public sector of corruption. Instead of playing G-men, ICAC investigators should be getting on with the job of eradicating potential corruption.

PARKING

They could start with the Earlwood police circular which stated: "The Minister for Police and Emergency Services has directed that Parking Patrol Officers are now 'self-funding'.

"In order to achieve that aim, those officers are required to issue an average minimum of 10 breaches per rostered shift. Should any parking officer fail to maintain the above figure, averaged on a monthly basis, that officer may be subject to immediate redeployment or dismissal."

This is the blatant imposition of fines on the public, for political purposes — namely the raising of revenue.

This is common practice by the police in shady Third World countries, but does it constitute official corruption within the meaning of the NSW Act?

I. C. A. C.

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ICAC officers get right to carry guns

INDEPENDENT P.3

By SUE QUINN

Commission Against Corruption officers have the right to use guns in the line of duty under new firearms regulations which come into effect last week.

The NSW officers are entitled to possess or use pistols "in the course of their activities as such officers".

A spokeswoman for ICAC said yesterday the new regulations were aimed at bringing the organisation into line "with other law enforcement agencies".

"We are just trying to get the full range of options available to all law enforcement agencies."

But the spokeswoman refused to give examples of cases where ICAC officers would be required to use guns.

Despite laws governing ICAC officers are allowed to obtain search warrants to enter premises to search for documents and inspect or confiscate documents as part of its inquiry.

This is part of an approach | backing-up of ICAC following its inception early in 1989.

Questions Without Notice

MR GAY:

Q: I will go to the questions on firearms at 1.1, particularly answer (c). Does the term "investigator" apply to non-police analysts and legal personnel and are assistant investigators authorised to carry firearms and, if so, what sort of qualifications and training do assistant investigators have?

A: In addition to the firearms that are issued by the Police Service to their officers who work with the Commission on a secondment basis, all of whom are fully trained police officers, and the security police, who again have police issued firearms, we have fairly recently obtained a dozen firearms which are described in the answer. As I think is made clear, it is not proposed that anyone should carry those firearms unless they are trained and certified for the purpose, and that training and certification comes from the Police Service. On no occasion has it been necessary for any Commission officer to use or pull a firearm in the two and a half years we have been operating to date. It is certainly not contemplated by me that we should ever have either lawyers or analysts carry firearms. I cannot be absolutely certain so far as assistant investigators are concerned. That is to say, I do not know precisely what is intended so far as they are concerned, save to say that certainly no Commission officer will carry a firearm, unless they have been trained for the purpose.

Q: Turning to question 1.2, do any of your staff undertake a theoretical or practical course or practical written examination? Has there been such a course? If so, what has been the pass rate?

A: I am unable to give you numbers. I just do not know how many have done it. I know that some have, but I do not know about pass rates.

Q: Is the course one that you have developed, or is it based on the police one?

A: It is based on the police one; it is developed by them.

Q: Basically, it is the police course?

A: Basically, it is the police course.

Q: Would any officer who would carry a firearm have completed this course?

A: Certainly. We are not going to send people roaming the streets carrying a firearm unless they are trained for the

purpose. Let me emphasise that they rarely leave the building with firearms. That is true of seconded police as well as our directly employed officers. It happens very rarely; in fact, I think it has happened only two or three times. But they have never had to pull a gun.

Q: You said earlier that there have been no occasions?

A: They have never had to pull a gun; they have never had to fire a gun. On only two or three occasions have they actually left the building with a gun. They have never had to use guns.

Q: In fact, your investigators have never had to use a gun?

A: They have never had to fire a gun or pull a gun. If that continues for the next two and a half years I will be delighted. But there are occasions when it would be remiss of us to send them out without having the capacity to defend themselves.

MR GAUDRY:

Q: In those circumstances, given the severity of those occasions, would it not be possible to ensure that you had a seconded police officer involved in the operation?

A: That is not practical. In a fairly high proportion of cases, when we are executing search warrants, we have to execute as many as half a dozen simultaneously for the sake of operational effectiveness. That means that you are using just about all your operational people at once. That has happened, I suppose, on half a dozen occasions.

MR GAY:

Q: Question 1.6 states, "What sort of firearms and what type of ammunition is carried by ICAC officers?" How can a semi-automatic pistol be safer than a standard revolver? If this weapon is safer than the police issue revolver, why are seconded police not issued with semi-automatic pistols? What are the implications of seconded police not being issued with a weapon as safe as those used by other ICAC staff?

A: I know very little about firearms. I cannot speak with any authority about relative degrees of safety. I stress that we are talking about relative degrees of safety which is not to be understood as saying that the firearms the police use are not safe. They obviously are. The expert advice the Commission has received is that what we have got is somewhat safer. We have simply left the police with the firearms to which they are accustomed. I do not denigrate their safety for a moment, but we have decided to use something a little different which is thought to be preferable. I cannot take it further, I am sorry.

Q: Probably the most important question is 1.7 which states, " . . . ICAC officers carrying firearms brought the ICAC into line with other law enforcement agencies". I believe that question has not been answered. It is misleading to suggest that the term "law enforcement agency" does not have a precise meaning. Indeed, the term "law enforcement agency" is used in s.16(5) of the Independent Commission Against Corruption Act, which makes it clear that the Independent Commission Against Corruption is not regarded as a law enforcement agency. Furthermore, the comparison with the ICAC and agencies such as the Department of Agriculture and the National Parks and Wildlife Service is misleading. Officers in these agencies have a limited prosecution role, but the ICAC is an investigative agency. Perhaps a comparison with the Australian Taxation Office and the Office of the Ombudsman would be a fairer comparison. The ICAC is not a law enforcement agency?

A: I have no difficulty with the proposition that the ICAC is not a law enforcement agency. I do not think of the ICAC as being a law enforcement agency, and I have made that clear enough over the years. I think the ICAC is about achieving desirable change rather than simply enforcing the law. Our answer was directed to how it came to be that these words were uttered. What is being said is that the officer has been quoted, but quoted inadequately. The point is that we do operational work and, unlike the Office of the Ombudsman, we go out and we execute search warrants. Sometimes we execute search warrants on people who are dangerous. That is significant field operational work and we cannot stop doing it; therefore, we need firearms.

Q: Given that you have seconded police and security officers and anyone who is coming from gaol to give evidence is protected or covered by prison warders, I really cannot see the need to extend the use of weapons beyond that. It gives the perception that you are setting up an alternative police force?

A: I am sorry that you have that view. It is one with which I respectfully disagree. As I have said, we permit our people to carry firearms only in the most tightly constrained circumstances. They do so infrequently, but in my view it would be remiss to have them go out in some circumstances unarmed.

MR GAUDRY:

Q: It is of some concern to me—it must be to you—that the perception of the Independent Commission Against Corruption is as a preventive and investigative agency. Hypothetically, the view of the Commission would change somewhat dramatically if, say, one of your officers, in the execution of a warrant or even in self-defence, was called upon to use a weapon which perhaps resulted in the death of

a person. Do you not see that as a particularly difficult situation?

A: Yes, it is, but I would rather face that scenario than have one of my people shot. The figures really speak for themselves. There have been three occasions on which our people have gone into the field carrying firearms. You cannot lift that to a level of "an alternative police force" or "grave public danger". You just cannot do it and we will not change our ways.

MR TURNER:

Q: When you say three of your people would they have been accompanied by seconded police officers?

A: They may have been seconded police officers. I am informed that on only three occasions our people have gone out carrying guns. That is in two and a half years.

MR GAY:

Q: Given the rarity of that occurrence, do you also concede that there is no need for it?

A: With respect, I know what operational work we are doing and what is coming up and I say that it is necessary. I know the sort of people that we will have to tackle and I think it is necessary.

Q: Surely the seconded police that you have on your staff would be sufficient?

A: No, I do not agree with that. It is not true when you remember the need to execute a whole series of search warrants simultaneously.

Q: Certainly it has the potential of changing the impression of the charter of the ICAC, the arming of ICAC personnel?

A: I do not agree with that, because I know and I have conveyed to the Committee the infrequency with which this has happened. I do not think the risk of a change of perception is there.

MR TURNER:

Q: Seconded police take their guns with them from the Police Service. Do they carry those at all times?

A: No, they behave as everyone else does and we are much more limited in the circumstances in which we permit it to happen because I think we are prudent but also because our people are not roaming around dealing with desperate criminals on a daily or weekly basis. Of course that is right—of course we are different from the police.

CHAIRMAN:

Q: You mentioned earlier the pass rate and you did not have the information. Would it be possible for you to provide that to the Committee later?

A: Yes.

THE COMMISSION HAS SUBSEQUENTLY PROVIDED THE FOLLOWING WRITTEN ADVICE:

To date fifteen investigators have completed theoretical and practical firearms training courses. Fourteen passed the course and the fifteenth is undergoing remedial training. It is worth noting that all directly employed investigators who have previously been members of police forces have undertaken training in the use of firearms in those forces. Nevertheless, they do not carry firearms until they have successfully completed the course for Commission staff.

Seconded police and security police have all been trained in relation to firearms within the Police Service.

CHAPTER TWO

EFFECT OF SUPPRESSION ORDERS ON LEGAL REPRESENTATION

Questions on Notice

Q: 2 **The Committee has recently received correspondence from a firm of solicitors and the President of the NSW Bar Association concerning the effect of a suppression order made by the ICAC. It was put to the Committee that the suppression order effectively prohibited a witness before the Commission and his solicitor from briefing counsel for a number of days.**

Q: 2.1 **Why was it necessary for the suppression order to prohibit the briefing of counsel?**

A: The suppression order was made at the end of a private hearing, so that an ongoing investigation would not be prejudiced. It was intended that the order would operate for a short period, estimated to be one week to ten days. The order did not preclude the witness from obtaining legal advice from the solicitor he chose to have with him at the hearing. There was imposed a temporary restraint on briefing counsel, so that all persons present at the hearing would be bound by the order. To have informed anyone outside that group of persons about the evidence could have created a risk of dissemination of the evidence and prejudice to the investigation.

Q: 2.2 **What is the Commission's response to the complaint that a serious matter of principle is at stake and that a person was effectively prevented by the suppression order from seeking the full level of legal representation that he desired?**

A: The order was varied after six days to permit the witness to brief counsel, if he chose. The witness was at no time deprived of legal representation. During the six day period he had available to him the lawyer he had chosen to represent him at the hearing. No hearing involving that witness was held during the six day period. No such hearing was contemplated during that period, or at the time the order was made. A hearing involving that witness was not held for more than seven weeks after the initial hearing. The witness's solicitor was informed of that intended hearing three weeks before the date of the hearing. That hearing did not involve the taking of evidence; that occurred a further two weeks later.

Q: **2.3 What is the Commission's response to the complaint from the President of the Bar Association that the suggestion that counsel could not be briefed in this situation because they might "gossip" amounts to an insult to the Bar?**

A: The Commission has informed the President of the Bar Association that no insult to the Bar occurred in fact or in intent.

Questions Without Notice

MR NAGLE:

Q: The suppression order that you made and the letter you received from Mr O'Keefe, the President of the Bar Association, you did say that no insult was intended. I did not perceive it as an insult. What I perceived it to be was a problem about a person before one of your inquiries having the right to have counsel briefed. Would you like to just express your views on that?

A: Counsel do, of course, provide advice but they are principally significant as advocates. The starting point is to stress that no witness was deprived of any right of representation. There was no limitation in any way upon that person's right to bring along an advocate of choice. At the time the suppression order was made, we had reached the point in the particular investigation where we had to go off and do some more urgent field operational work in order to follow up on what he had told us, with a view to carrying through with a successful investigation. That investigation is now being conducted; he is an important witness. There were a couple of months between the occasion when the he gave evidence the first time and the occasion when the second hearing started. He has got counsel of his choice on that second occasion. The suppression order was in force for, I think, four working days only. So far as the right to obtain legal advice is concerned, we did not make an order that would preclude him from taking legal advice. He was represented by a lawyer of his choice whom he brought to the hearing. So what you are left with is to say that he could not for that four-day period go beyond the solicitor whom he had said was the person who would represent him, and through that solicitor brief counsel for that short period. I cannot see that any possible harm was done.

Q: Only to the extent to which, with no disrespect to solicitors, an advocate is a person who participates a lot in the day-to-day running of procedures and understands the law on that advocacy basis?

A: I understand that. There were not any proceedings though, in that time. Nothing was happening.

Q: You did make a comment about barristers gossiping. Would a way around that not have been to ask counsel not to discuss the matter, if he had had counsel at that point in time?

A: If he had a barrister there, of course the barrister would have become part of the permitted class, barrister and solicitor. He did not have.

MR GAUDRY:

Q: Given the nature of that particular matter, would it be common knowledge to someone coming forward to give that evidence that they may be subject to a suppression order or should that perhaps be something that is more widely advertised?

A: I would be very surprised if the particular witness did not know a suppression order was going to be made. There are letters written, contacts made, they are called in. I am certain at the beginning of the hearing that I said a suppression order would be made at the end of the day and I would be very surprised if the individual witness did not know that before he turned up, very surprised.

Q: But it is not necessarily part of the advice that goes out?

A: As a matter of practical certainty, they are told. I mean they have to be told it is a private hearing. They receive a summons saying, "You must not talk about it". In that context I would practically take for granted that they would be told about suppression orders being likely.

Q: But it might then be an advantage to have that structured within your advice?

A: Yes, it might be. We can think about that. You are making a trade-off because whenever you do that your document, your standard advice document, becomes that much longer and that much harder for people to read through. I mean most people do not relish the challenge of having to read more than a single page of type to try and make sense of it. That is the truth of the matter. We have put a lot of effort into getting our advice to witnesses simple and comprehensible and no longer than it has to be. It is still a three-page document.

CHAPTER THREE

MEDIA RELATIONS

Questions on Notice

Q: 3 **Attached is a copy of the apology which the Hon Ian Causley MP has recently received from the Sydney Morning Herald and Mr Murray Hogarth concerning a number of newspaper articles published during 1989. These include a number relating to the ICAC's North Coast inquiry hearings. Also attached is a report of one day of the proceedings Mr Causley had commenced in relation to these articles.**

3.1 Were any steps taken by the Commission during the course of the North Coast inquiry hearings to correct "inaccurate and misleading statements concerning Mr Causley's conduct as a minister" which were contained in newspaper reports of the proceedings?

A: So far as can be recollected, the Commission was not aware of any inaccurate reports relating to Mr Causley during the course of the North Coast inquiry and hence took no steps in relation to such. On occasions if the Commission considered that a report of a hearing contained an inaccuracy, the Commission's media liaison officer or General Counsel spoke or wrote to the journalist or editor responsible. That is in accordance with the Commission's usual procedure. Attached is an article which contains a correction of a report requested by counsel assisting the Commission in the North Coast inquiry. The Assistant Commissioner conducting that investigation also made statements during the hearing in respect of inaccurate media reports.

Q: **3.2 In view of this apology, has the Commission reconsidered its approach to relations with the media or its assessment of media reporting of its hearings?**

A: No. The Commission monitors media reporting of all of its activities, including hearings, and takes issue with the media when it considers it appropriate and that it will lead to a positive result. The Commission cannot control the media, it is not the Commission's function to do so and the Commission does not seek to do so. From time to time the Commission will take action in relation to a media report when it considers it appropriate, as outlined above. That happens infrequently rather than frequently.

CAUSLEY, Ian

The Sydney Morning Herald

Original not to be removed from Library

21 SEP 1991

Apology to Mr Ian Causley MP

In articles written by Murray Hogarth and published in the *Herald* on January 21, 1989, entitled "In the Nationals' interest", imputations were made which reflected on the conduct of Mr Ian Causley as the Member for Clarence and as the Minister for Natural Resources.

Mr Causley has sued for defamation on those imputations in the Supreme Court. His claim against the *Herald*, its editor, Mr Max Prisk, and Mr Hogarth, has been resolved to the satisfaction of all parties. It has resulted in a verdict and payment to him of a substantial sum for damages and costs.

It is acknowledged that the imputations complained of were false and baseless. The *Herald* and Mr Hogarth unreservedly apologise to Mr Causley and to the members of his family for the hurt and embarrassment caused by the publication.

The *Herald* and Mr Hogarth also acknowledge and regret that some articles concerning the proceedings of the ICAC Inquiry into Land Development on the Northern Rivers contained inaccurate and misleading statements concerning Mr Causley's conduct as a minister.

It is accepted that in respect of Mr Causley the ICAC found that there neither is nor was any or any sufficient evidence to warrant consideration of prosecution, disciplinary action, or action directed towards dismissal or termination of service.

CAUSLEY/7

The Sydney Morning Herald

13 SEP 1991

Journalist reported 'absolute opposite'

DEFAMATION

(2)

By NEALE PRIOR

A journalist reported the "absolute opposite" of testimony given to the Independent Commission Against Corruption by a senior public servant working under the NSW Minister for Natural Resources, Mr Ian Causley, a Supreme Court jury has heard.

Counsel for Mr Causley, Mr Robert Stitt, QC, said yesterday that the secretary of the Department of Lands, Mr Stan Day, had specifically denied during ICAC hearings that Mr Causley treated a developer's bid for a resort site at Fingal Head, near Tweed Heads, with "extraordinary urgency".

But the journalist, Mr Murray Hogarth, had reported in *The Sydney Morning Herald* that Mr Day had "confirmed" the allegation, Mr Stitt said.

Giving evidence to a jury at Grafton, Mr Hogarth said yesterday he believed that Mr Day had confirmed the allegation in the "totality of his evidence".

Mr Causley has sued Mr Hogarth, John Fairfax & Sons Ltd, publisher of the *Herald*, and the newspaper's editor, Mr Max Prisk, over two articles published on January 21, 1989.

The minister has claimed the articles implied he was prepared to change the law to accept the wishes of property developers.

He also claimed that articles reporting the ICAC's inquiry into North Coast land deals were a "continuation of the campaign against the National Party and me as a member ..."

Counsel for John Fairfax, Mr Henric Nicholas, QC, said yesterday he was withdrawing the defence of fair report from articles that were published on July 27 and July 29, 1989.

The July 29 article covered Mr Day's testimony. The article of July 27 reported, in part, the assistant director of the Department of Lands, Mr Derek Sinclair, telling the ICAC that Mr Causley had handled a bid for Fingal by the developer, Ocean Blue, with "extraordinary urgency".

Mr Stitt suggested to Mr Hogarth that his July 27 article was unfair because it failed to report evidence from Mr Sinclair that the previous Government had decided to deal with the Fingal site as a "matter of urgency".

Mr Hogarth: It is not possible to report all the events on a given day.

According to the article, evidence was given that a money-lending company, Lismore Management, had loaned funds to a property developer. One of the directors of Lismore Management was a Mr Elton Stone, it said.

Mr Stitt pointed out a paragraph, in square brackets, that described Mr Stone as the chairman of a company that was "doing a $10 million development on Lismore's Ryan Hotel site, formerly owned by Mr Causley".

Mr Hogarth agreed with a suggestion by Mr Stitt that there was no mention of Mr Causley and the Ryan Hotel in the ICAC proceedings.

Mr Stitt: What did it have to do with anything raised at the ICAC?

Mr Hogarth said Mr Stone's name had been mentioned in proceedings and "if I thought it could have possibly been relevant, I would put it into the story".

Mr Stitt criticised a paragraph in the July 29 article that reported testimony that another contender "had topped Ocean Blue's bid of $8.1 million with an offer of $8.5 million on the day Ocean Blue was given approval by Mr Causley".

He said the evidence was that the bid came in two or three months after the expressions of interest had closed.

The hearing continues.

The Sydney Morning Herald
Original not to be removed from Library
22 NOV 1989

25

MP changes his evidence about Munro

By MURRAY HOGARTH

Mr Don Page, a National Party MP who the Independent Commission Against Corruption has been told could be prosecuted over a "bribe", yesterday gave last-minute evidence to the Tweed inquiry.

He changed his earlier testimony that he had arranged ministerial meetings for an alleged graft bagman, Dr Roger Munro, saying he now believed that he had only "intended" to arrange the meetings.

Mr Barry Toomey, QC, senior counsel assisting the ICAC, submitted last week that there was "plain evidence" of bribery in regard to a $10,000 donation from Dr Munro to Mr Page's election campaign in 1988.

He further submitted that it had been intended to "buy access" to Ministers, and that this had occurred. If so, he suggested, Mr Page and others could be prosecuted for bribery-related offences.

CORRUPTION
THE TWEED INQUIRY

Mr Page's changed evidence was allowed only after sometimes heated debate between his barrister, Mr George Palmer, QC, and the Tweed inquiry commissioner, Mr Adrian Roden, QC.

At one stage Mr Roden declared: "No-one will be prejudiced, nor will I be blackmailed into doing something that I do not believe I should do by the threat implied in the use of such terms to me."

Mr Palmer denied "implying any threat", but argued – in the end successfully – that Mr Page and his campaign director, Mr Chris Lomax, should be recalled for the sake of "fairness".

In his earlier evidence, Mr Page recalled making telephone calls to arrange meetings at short notice with the Deputy Premier, Mr Murray, and the Minister for Natural Resources, Mr Causley.

Mr Toomey last week submitted that the "objective fact" was that Mr Page had arranged the meetings and that his evidence that he would do so for any constituent should not be accepted.

But yesterday, Mr Page claimed to have based his "recollections" on a letter from Dr Munro, which thanked him for arranging the meetings, even though he could not recall having done so.

"While I am not prepared to deny that I sought to make appointments for Dr Munro, I say that it is possible that I did not seek to make the appointments at all . . . ," he said.

Mr Page also claimed yesterday that although he had known that Dr Munro had intended making a donation to the Nationals, he had not known it was for his campaign until after the election.

His suggestion that he had pushed for the return of the money to the Ballina Electorate Council from National Party headquarters to pay a $5,000 television advertising bill was supported by Mr Lomax.

Under questioning by Mr Toomey, Mr Lomax revealed that last Friday he had been sent a copy of Mr Page's new sworn statement, which was tendered to the inquiry yesterday.

● Mr Toomey took issue with a paragraph in yesterday's *Herald*, which said that he had submitted that a finding of "corrupt conduct" for the purposes of the ICAC legislation could be made against a National MP, Mr Don Beck.

He told the inquiry he had said "no such thing" while discussing with Mr Roden possible inferences that Mr Roden could draw by combining evidence relating to two donation matters, which touched on Mr Beck.

What Mr Toomey actually said was: "Commissioner, as to that, one may say that I am submitting that the evidence falls short of being such as should cause the consideration of prosecution, but I must say that in respect of the consideration of whether or not there is corrupt conduct, that may be a different matter."

(Under the ICAC Act, "corrupt conduct" includes any action by public officials that could lead to their being sacked or disciplined. In his report, Mr Roden can identify such conduct even if there is no criminal liability, as Mr Toomey has submitted is the case with Mr Beck.)

Mr Don Grieve, QC, for Mr Beck, submitted that it was "perfectly clear" that his client was free of any suggestion of improper conduct.

Questions Without Notice

MR TURNER:

Q: I refer to chapter 3 of your submission, dealing with media relations. It is now acknowledged that Mr Hogarth's reports in the *Sydney Morning Herald* contained inaccurate and misleading statements about Mr Causley's conduct as a Minister. What is the point in the Independent Commission Against Corruption having a media unit if such inaccurate reports are not picked up immediately and corrective action taken forthwith?

A: The Commission is concerned that reports of its hearings should be accurate. It will not always have information to enable it to say that reports are inaccurate. It is not a court that awards damages for defamation. It is not the Australian Press Council. All those avenues are available. As I have said in the written answer, we have on occasions taken steps, when we think there is the prospect of a benefit flowing from doing so, to point out mistakes with a view to having them corrected—and on occasions that has been done. I do not think we can sensibly do more than that.

Q: In Mr Hogarth's reporting of the incident which gave rise to the defamation case there was significantly inaccurate reporting?

A: I do not know. I have not followed the case.

Q: The headline of the defamation case in the *Sydney Morning Herald* of 13th September, 1991, was "Journalist reported absolute opposite", and the commentary is referred to. That is a fairly significant statement and a fairly significant misreport. Is there now in place a mechanism whereby the Independent Commission Against Corruption can be more vigilant about media misreporting?

A: No, I would be misleading you if I said that we did have that. It may be, because of institutional experience, that we are handling these matters more thoroughly now than we were two years ago, but I cannot put it higher than that. There has not been a change in our approach, and I do not propose one. As I say, we are not the Press Council, and we cannot control the press.

Q: Surely, as in this case, when there is very obvious misreporting, when the report is totally the opposite, which causes great expense to and tremendous pressure on an individual—?

A: That is to say that if we had taken appropriate steps the proceedings would not have been necessary. I just do not think that is true.

MR GAY:

Q: That is a potential question?

A: Of course. Let me say that on occasion we do point out to the press that they have got something wrong so that they can consider what course they should follow. On other occasions we say something from the bench. Not infrequently we do those things because we are asked or pressed to do so by those who say they have been the victim of some inaccuracy. I am informed that Mr Causley never did that. It is not as though the matter was taken up with us, or that we were asked to do something but declined to do so. Naturally, if we are asked, we have to think about it.

Q: Does it concern you and the Commission that an individual, be it a high-profile individual, has had to spend a lot of money and has been caused anguish in having an inaccurate and misleading statement cleared, two and a half years after it was made?

A: I am concerned about any inaccurate reporting of what we do. I am concerned more if that does harm to individuals. If I said yes to your question I would be accepting that the proceedings were necessitated by the fact of our lack of action. That is untrue. The proceedings were taken with respect to a defamation which was foreign to our proceedings. Our proceedings became relevant only in demonstrating what was contended to be an animus by the newspaper towards the individual. Our proceedings were not central to it.

Q: Given that situation and in view of the verdict and the fact of other litigation concerning this journalist and others on that particular inquiry, has your media unit reappraised the reporting of that inquiry?

A: I do not think so; I mean nobody has sued. The defamation and damages were not granted for an inaccurate report of our proceedings.

Q: It was an inaccurate statement concerning that?

A: No, it was not, with respect. My clear understanding is that the stories sued on were foreign to our hearings. The way that the individual journalist Hogarth reported our proceedings was said to be significant by the plaintiff as demonstrating animus towards the plaintiff.

Q: The apology says quite clearly that the *Sydney Morning Herald* and Mr Hogarth also acknowledge and regret that some

articles concerning the proceedings of the ICAC inquiry into land development in the Northern Rivers contained inaccurate and misleading statements?

A: I know that, but they never asked our view about that. That is not what he sued for. That is just the terms of the settlement.

MR TURNER:

Q: The report in the *Sydney Morning Herald* about which I spoke a moment ago states that counsel for Mr Causley, Mr Robert Stitt, QC, suggested that the Secretary of the Department of Lands specifically denied during the ICAC hearing that Mr Causley treated the developer's bid at the resort site at Fingal Head near Tweed Heads with extraordinary urgency but the journalist Mr Hogarth had reported in the *Sydney Morning Herald* that Mr Day had confirmed the allegation. That is directly out of the ICAC hearings?

A: That is still not what he sued for and it is still not what necessitated the actions.

MR GAY:

Q: But it is certainly my statement that it is perhaps an area that you should be looking at to reappraise?

A: Whenever there is an inaccurate report it is a matter for regret. Whenever there is an inaccurate report which relates to individuals, it is a matter of serious regret. In those circumstances, yes we should point it out and we shall seek to do so. But it would be wrong for me to say to the Committee that we are going in some way to radically change our approach. Every report is a distillation of an awful lot of words into a few hundred words. The process of selection is very difficult. They keep writing stories in a way we do not like. We would like to write them ourselves. They would then be accurate and they would have our slant on them. Everyone wants to write for the press but you cannot do it: the press have to do it, it is a free press. If they get it wrong, they get sued.

MR TURNER:

Q: Coming back to the narrowness of it, I think you said earlier in answer to my second question that you do not intend to change in any formal way or fashion?

A: No; I think we are probably doing it better than we were doing it two years ago. But it is very important that I should not mislead the Committee by saying, "Yes, by golly we will change this and get it right". I cannot be absolutely certain that in broadly similar circumstances we are certain to take action in a case like this. We

encourage our media people to do this. The lawyers involved in the teams look at reports. Quite often we take steps. We do quite a lot. Compare us with the courts. The courts, being essentially passive institutions, do nothing.

Q: One of the main ways that you get your message out is through the media, but, with respect, people do not come to read your reports with the vigour, perhaps, that we do. I think it is the essence of fairness, within the scope of the Act, where something is so blatant, that it should be encumbent on you to make some comment without a request, to ensure that your accurate message about corruption and corruption prevention is going out?

A: I do not want to give the impression that I am at all light-hearted about this. We do take it seriously. I just do not want to mislead the Committee. I do not like it at all.

CHAPTER FOUR

RIGHTS OF ICAC EMPLOYEES

Questions on Notice

Q: 4.1 Given that the Public Sector Management Act does not apply to Commission staff, what are the rights of ICAC staff and secondees, for instance in the case of dismissal or termination?

A: Essential to fighting institutionalised corruption is mobility of staff. It is for this reason that the Commission has no permanent employees.

It is also essential, if the integrity of the investigation process is to be assured, that the Commission retain total independence.

Because of the extremely sensitive nature of its work, and the need for high levels of security, the Commission must be able to terminate contracts without giving reasons for doing so.

It is for these reasons that no appeal mechanisms apply in case of termination. Commission employees have the usual common law rights.

That is not to say that the Commission takes lightly its obligations to staff. The Commission has in place a detailed performance appraisal system. Each employee is evaluated after the first 6 months of employment and, thereafter, on an annual basis. The performance appraisal system is designed to provide employees with feedback and to identify areas of superior or poor performance. Employees discuss the appraisal with their supervisor and may challenge it by taking it to senior management and, ultimately, the Commissioner. Unlike its counterpart in the New South Wales Public Service, this scheme is mandatory.

It should be made clear that dismissal of an employee occurs rarely and never before being fully explored by senior management. The ICAC Code of Conduct sets out sanctions for a range of actions that the Commission considers to constitute unacceptable behaviour. Those sanctions include:

- counselling by supervisor or senior management, or in extreme cases, the Commissioner;

- a record of behaviour being documented and placed on file;
- not being recommended for salary increment;
- not being recommended for further term of employment;
- dismissal; and
- prosecution.

All prospective employees are provided with a detailed package of information at the time the offer of employment is made. This package includes the Code of Conduct and the terms and conditions of employment. Employment is confirmed only after prospective employees certify that they have read and understood the terms and conditions of the offer.

The Commission's power to terminate employment without giving reasons is explained to each potential employee during the security vetting process. All offers of employment at the Commission are made on the basis that that provision is understood. The terms and conditions which are provided to each potential employee state that employees do not have recourse to the Government and Related Employees Appeal Tribunal or the Industrial Tribunal. Again, this provision is designed to protect the Commission's independence and operating autonomy.

Q: **4.2 Are the contracts entered into between employees and the Commission subject to any award, industrial agreement or determination of an industrial tribunal?**

A: No.

Q: **4.3 Would the Commission see any merit in the provision of a specific award for ICAC staff, along the lines of the "National Crime Authority Administrative and Clerical Officers Award of 1984" or a similar specific award being considered by the Criminal Justice Commission? (See attached material from Queensland Parliamentary Criminal Justice Committee.)**

A: Staff of the National Crime Authority are permanent public servants, unlike staff of the Commission. This makes any suggestion that the Commission adopt a similar award impractical for the reasons outlined in 4.1.

The Criminal Justice Commission has advised the Commission that it is not considering an award.

Q: **4.4 What sort of security vetting and disclosure requirements are Commission employees subject to? Have these requirements proved to be sufficient?**

A: For vetting purposes, Commission employees are required to:

(a) provide personal particulars as prescribed by the form appearing in Schedule 1 to the Regulation to the ICAC Act;

(b) provide a statement of financial interests in accordance with the form prescribed in Schedule 1 to the Regulation under the ICAC Act;

(c) sign an undertaking as to secrecy;

(d) complete a statutory declaration attesting to the accuracy of the personal particulars information provided, and declaring that the employee has not associated within the past 5 years with any known or reputed criminal or naming such persons,

(e) provide a signed consent for the release of information from any bank or other financial institution;

(f) provide a signed consent for the ICAC to conduct any such inquiries as may be necessary for the purposes of assessing suitability to be an officer of the Commission;

(g) Commission security staff interview two personal referees nominated by the employee,

(h) information provided by the employee may be checked by reference to various authorities, such as the Police Department.

The vetting process is usually commenced and completed at short list stage and prior to any offer of employment being made.

These requirements have proved to be sufficient.

Questions Without Notice

MS BURNSWOODS:

Q: I wish to ask some questions about the rights of ICAC employees. What is the length of the contracts entered into?

A: Some employees are on two-year contracts, some are on three-year contracts. There are some about whom all we can say is that we have not guaranteed permanence, that is to say the contracts are open-ended. But we do have a general belief that, at least in the operational areas, people should not stay with us for very long period of time because that could be conducive to internal corruption. Staff turnover seems a desirable anti-corruption measure. That is really on the operational side. I could imagine somebody who was working purely in administration being with us for 10 years—there is no reason why not—but on the operational side periods of service are likely to be distinctly shorter.

A: When someone on the administrative side joins, they do so on an open ended contract or a shorter one with a right of extension?

A: A lot of our administrative people are seconded officers. Those secondments are sometimes for a finite period of, say, a couple of years. Those secondments may themselves be open ended. Obviously with seconded officers, if we have to ask them to leave, they have somewhere to go back to. A lot of our administrative staff—I would guess half or perhaps more—are seconded officers. Quite a lot of our operational staff are secondees as well.

Q: The question 4.1 relating to the rights of staff and secondees actually gave as instances cases of dismissal or termination. I was curious about promotion or other sorts of things related to rights—claims of discrimination or whatever. Do the same broad answers you have given here apply, or are there others?

A: I think they do, I cannot be quite sure about that. I do not know about the Anti-Discrimination Board. I think we would be subject to them. But the traditional industrial tribunals, we are not. What I have sought to do is say they are not available, here are the reasons why, and then importantly, but we do put a lot of effort into having proper policies so far as staff relations are concerned. For example, there are these appraisals which are run. Most people reckon they have appraisal schemes but I really think we have one that works properly. It is done regularly and there is proper feedback to staff and so on.

MR GAUDRY:

Q: On the matter of staff, what procedures do you have in place to ensure that your operational team does not finish up being not only lean but green in the operational phase ... Do you have a staff retention policy?

CHAIRMAN:

Q: I think the question should be asked on general principles.

MR GAUDRY:

Q: Yes, on general principles, not related to any particular matter?

A: As the report mentions, the quality of operational staff we are now taking on is higher than it was at the beginning, and it was never low. I think the greater part of the credit for that belongs to the Commission for having got itself a Director of Operations of very high repute, and principally to that individual. The fact that Peter Lamb is running operations has enabled us to do better in the recruitment area. We are taking on very experienced officers. There is no one there who is green.

Q: I meant green more in the sense that obviously ICAC has a different mode of operations than do other enforcement agencies and therefore there would be necessarily a time of learning?

A: Yes. It takes a while. Quality staff can pick up what you are doing pretty quickly. Recently we sent back a couple of seconded police who had been with us for two years. One of them was a chief investigator who was in charge of the team that had done about five or six formal investigations, including the Tweed matter, and Tamba [misuse of confidential information] most recently. It is quite remarkable what you can get out of quality staff in a couple of years. I would expect that our directly employed staff would be with us for periods longer than that, more like four or five years typically. It really is surprising how much you can get out of people in just a couple of years.

MS BURNSWOODS:

Q: Do you have information on the turnover rate for different groups of Commission staff?

A: I do not have it with me, but yes, we keep an eye on that.

Q: Senior management and investigators?

A: We can pull out that information quite quickly. I recently did an exercise on the ratio in the operations department of seconded police as against directly employed police, and perhaps more significantly, the ratio of those who had a New South Wales Police Service background against those who did not. That was an interesting exercise and we do that sort of thing from time to time. That is the only one I can think of that I have caused to be done recently, and it was quite interesting.

Q: It would be interesting to have information on that?

A: Yes.

CHAIRMAN:

Q: On that information, I think you indicated that you could supply that material in regard to senior management?

A: I would need to be told very precisely what was wanted, and I would rather not just take it on the run. If Ms Burnswoods could write and let me know what she wants, I will happily provide it and it can be circulated to the Committee. If you could tell us what you need, we can provide it.

MS BURNSWOODS:

Q: For instance what you just said about the work you caused to be done is interesting and would be interesting to us. We would not have known it was there if you had not mentioned it?

A: Yes, I understand that.

Q: Do you advertise all vacancies in outside advertisements?

A: If that is not an absolutely true statement, it is so close to true that it might as well be. I can think of a case in which we did not, because what was involved was a minor upgrading, not much more than a redesignation of our Director of Technical Support to become a Deputy Director of Operations. After careful consideration we decided that advertising would simply be a waste of money, because nobody was going to be able to compete against this individual. I do not think there have been other exceptions.

Q: I have one specific matter. Why did it take six months for the vacancy caused by David Catt's departure to be advertised?

A: Because we have been working on a restructuring of that position. Ms Sweeney was the Acting Commission Secretary. We decided that that was an inaccurate description and the new description, which is Solicitor to the Commission, is a better one. More significantly, we have taken Assessments out of that area and put it into Operations, and we have created a research function within that person's line of responsibility. So what was legal and assessments has become legal and research. It is a rather smaller job, and in the course of a recent review of senior management salaries, when most went up, that one did not, or it might have done by $500 a year or something of the sort. But broadly what I am saying is right. So we were

undertaking a review of the position. I am reminded that restrictions were put on the public sector generally so far as advertising new jobs are concerned, about the middle of the year.

Q: You were subject to freezes?

A: They do not actually apply to us, but we thought it would give an unhappy appearance if we were rushing out with display advertisements for jobs at a time when no one else in the public sector could run them. We decided it would be prudent and it would indicate an attitude of comity if we held off until others were in a position to advertise.

CHAIRMAN:

Q: You mentioned not advertising for, in effect, a technical officer because there would be no one with those sort of qualifications. I can understand the economic rationalism in relation to that. There might be a concern that in terms of appearance it may still be better to advertise so you are not subject to any sort of criticism whatsoever?

A: I understand that and that is a factor we took into account. I should also say that a related consideration was that in security, you get into very, very sensitive areas. We might well want to do some recruitment without advertising in security and that was a related consideration. I have to say that there could be some jobs that we cannot publicly advertise for security reasons.

MR TURNER:

Q: In your written answers in this particular section, you say that you must be able to terminate contracts without giving reasons for doing so. Is that all contracts, your administrative side and your operations side?

A: Yes, all contracts, including senior management contracts. They have formal contracts that give me the right to get rid of them without giving reasons.

THE COMMISSION HAS SUBSEQUENTLY PROVIDED THE FOLLOWING WRITTEN ADVICE:

I am writing in response to the Hon Jan Burnwoods' question as to whether the Anti-discrimination Act 1977 applies to the Commission.

I have examined the question and consider that Parts 2 - 5 of the Act, proscribing discrimination on various grounds, apply to the Commission. Although the Anti-Discrimination Act does not expressly refer to the Commission, the Independent Commission Against Corruption Act does not

expressly exclude the operation of the Anti-Discrimination Act.

The Commission applies Equal Employment Opportunity principles in its employment activity, has always done so, and so states in its employment advertising.

The Commission considers that Part 9A of the Act does not apply to the Commission, because the Commission is not one of the authorities lists in s.122B. The Commission's view in this regard has been confirmed by the Director of Equal Opportunity in Public Employment.

CHAPTER FIVE

PERFORMANCE INDICATORS, INTERNAL REVIEWS, IMPLEMENTATION OF RECOMMENDATIONS

Questions on Notice

Q: 5.1 What performance indicators has the Commission put in place to measure its effectiveness as an organisation?

A: The Commission will shortly reach its full complement of staff. Effective performance measurement can only take place in a mature organisation. In order to prepare for this, the Commission recently recruited a staff member with experience and skills in the area of strategic and performance management. That person's skills will be dedicated in the immediate term to producing evaluation mechanisms, determining a corporate strategy for the Commission, and devising methods of evaluating the Commission's performance in all aspects of its work.

The difficulty of the task should not be underestimated. As the Premier stated:

> *"It would be crass and naive to measure the success of the Independent Commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State.".*

Q: 5.2 What procedures exist for internal reviews of management structures and performance within the Commission?

A: The senior management of the Commission meet on a weekly basis to share information, and sometimes at those meetings issues of strategic importance are considered. The Commission holds a Senior Management Forum on a biannual basis, attended by senior management, to discuss a range of matters including the Commission's structure, strategies and operations.

The forum provides a formal opportunity for internal reviews of structures and operations to occur. In addition, there is a high level of informal interaction amongst senior management throughout the year, as needs arise.

Q: **5.3 Have any external agencies or consultants been used for such internal reviews? Are they likely to be used in the future?**

A: No external agencies or consultants have been used for internal reviews of management or structure-related issues. While the Commission has no immediate plans to arrange such consultancies, it does not discount the possibility of requesting external assistance in these areas at any time in the future.

Q: **5.4 What procedures, if any, are in place for the monitoring by the Commission of the implementation or outcome of its recommendations (particularly in investigation reports)?**

A: Monitoring the implementation of the Commission's recommendations is largely the province of the Commission's legal personnel and the Corruption Prevention Department. There is not a formal program as such. The methods include contacting authorities or other organisations the subject of recommendation for advice about implementation, formal corruption prevention projects and appearing before Parliamentary Committees to offer information and assistance. The Commission has previously encouraged the Committee to take a role in this regard, given the terms of s64(1)(c) of the ICAC Act and the Committee's influential position.

Q: **5.5 Has the Commission set a date (year) by which it believes its work will be complete and the ICAC no longer required?**

A: The Commission has not set a date by which it believes its work will be complete and the Commission no longer required. That will not occur during the term of office of the present Commissioner. It is difficult to talk about the work of the Commission being "complete" because it is unrealistic to say that there will never be corruption in the public sector.

Questions Without Notice

CHAIRMAN:

Q: Perhaps I might ask a question on performance indicators and what sort of mechanisms you are looking at in that regard?

A: I could not provide any very useful response at this stage that goes beyond what has already been said. We now have formal published strategies in each of our functional

areas, which means that the work necessary to develop a formal corporate strategic document or business plan—call it what you will, and the labels do matter—will not be very great. That will I think be the next step. We have recruited somebody who will have prime responsibility in this area. We are presently giving active consideration to just how we can best measure what we do. I imagine that the available measurements will differ depending upon the area that one is looking at. Finally, I would not want the Committee to think that we have not been conscious of this need from an early stage. We have always kept quite a lot of statistics. That is tending to increase. These public attitudes surveys have to do with performance measurement. I suppose they have to do with more than that but that is one of the reasons why the expenditure is justified.

CHAPTER SIX

PROSECUTIONS

Questions on Notice

Q: 6.1 How many successful/unsuccessful prosecutions have taken place as a consequence of Commission investigations?

A: There have been five prosecutions commenced as a consequence of Commission investigations which have been successfully completed. No prosecution commenced has yet been "unsuccessful".

Q: 6.2 What were the charges? What sentences have been imposed?

A: The charges and sentences in those matters are as follows:

- Jennifer Gardiner, charged under s97 Election Funding Act of making a false statement in a declaration, pleaded guilty on 18 February 1991. No conviction was recorded, pursuant to s556A Crimes Act;

- Pero Dugandzic, charged under s249B(2)(a)(ii) (corrupt benefits), pleaded guilty on 6 December 1990 and was fined $2,000;

- Leon Donnelly, charged under s249B(1)(b) (corrupt benefits), pleaded guilty on 25 February 1991 and was ordered to enter a recognizance to be of good behaviour for 12 months and to pay court costs of $40;

- Gary Henwood, charged with break enter and steal, larceny as a servant and being an accessory before the fact to a false pretence, pleaded guilty and was on 7 January 1991 sentenced to concurrent sentences of 10 months imprisonment on the break enter and steal and larceny charges and ordered to enter a recognizance to be of good behaviour for 5 years on the third charge. He appealed but on 8 April 1991 withdrew the appeal.

- Luke Budworth, was charged with break enter and steal (an accomplice of Henwood), pleaded guilty and on 27 August 1991 was sentenced to nine months imprisonment.

Q: 6.3 When ICAC officers act as complainants to commence prosecutions, what happens if the prosecution fails and costs are awarded against the prosecution? Does the ICAC have to bear this cost?

A: When Commission officers act as complainants to commence prosecutions the Director of Public Prosecutions (DPP) takes over the conduct of the prosecution, pursuant to s9 of the Director of Public Prosecutions Act 1986, at the first mention date. The prosecution is then conducted by the DPP. If a prosecution fails and costs are awarded against the prosecution the DPP bears the costs.

[Refer also to Mr Temby's Opening Statement, pages 5 - 7]

Questions Without Notice

MR NAGLE:

Q: Going to the prosecution document that you supplied to us, I notice a number of prosecutions are outstanding because the Director of Public Prosecutions is still considering them—and the Tweed is one. That inquiry has been over for some time. Is that fair for those who are trying to find whether or not they are likely to be prosecuted?

A: I would say two things. First, I would not want to lay blame for delay in that matter at the door of the DPP, because there are or may be one or two briefs that we are still working on. In one of those matters we cannot get witnesses to sign statements, including witnesses in high public positions. They will not sign statements; they do not want the prosecutions to proceed.

MR TURNER:

Q: I wish to ask about prosecutions. I notice, arising from your written answers, a couple of charges of break, enter and steal and larceny as a servant. Does that really come under your charter or is it more a flow on?

A: A question was asked about prosecutions as a result of the Commission's work. It is not central to our work, but in the course of doing that Wagga Wagga matter we found that this policeman had turned into a criminal. We were helped by a joint task force that did the work, resulting in charges being laid. He is out of the force and has been sent to prison.

Q: Who laid the charges?

A: One of our chief investigators; whether at that time he was a chief investigator or a seconded police officer working on the joint task force, I am not quite certain. But it

was our work. I do not want to give the impression that we have become another police force.

Q: You stole my question?

A: We do not have a breaking squad. If it was not for the ICAC, the work would not have been done. The work was very valuable. That policeman had turned in to a criminal.

MR TINK:

Q: You said a little earlier that ... there is a distinction between the type of crime involved in allegations of corruption and the type of crime involved in crime where there are victims in the traditional sense. Does that flow through to the way in which these matters ought to be prosecuted? What other distinctions are there between the way these matters should be dealt with in that process as distinct from traditional criminal matters?

A: I do not seek to distinguish corruption prosecutions from fraud prosecutions, major fraud prosecutions. But there are differences in the way they should be dealt with. In some major fraud prosecutions I think there should be a mandatory committal hearing. That is to say, in some major fraud prosecutions I do not think it is feasible and sensible to try to construct a case on the paper. In my previous job, when we were prosecuting the bottom of the harbour entrepreneurs, had it not been for the capacity to actually run a committal hearing and make reluctant witnesses speak, I do not think that very important job could have been done. That is a difference. Another difference is that it is essential in the document intensive cases, which these tend to be, that there should be worked out well in advance, preferably on a co-operative basis, just how exhibits are going to be numbered and handled. That sounds trite but it is profoundly important.

In document intensive cases, which these tend to be, you need special equipment in the hearing room. In the last of the bottom of the harbour cases we ran in Perth, that was done by means of television monitors, which enabled documents to be thrown up before the judge, the witness, counsel and the jury. I could keep going. There are a lot of things that could be done to enable these prosecutions to be run effectively. But I am really talking there about the big ones. I cannot think of too many key differences simply because it is a fraud or corruption prosecution, except the one I have mentioned, which is the difficulty about witnesses. They tend to get big, and when they get big you have special difficulties about running big prosecutions—any big case.

Q: I shall go to what is on my mind and, in the context of that, I shall draw your attention to the document you tabled this morning entitled "Prosecutions Other Than

Completed Matters". In that there is a reference to six charges advised by the Director of Public Prosecutions to be laid. I do not know what that is about, but what triggers my attention in this regard is an allegation made last week on television in relation to Operation Raindrop. The allegation made was—and I am not sure whether it was a reference to you in your current position or it could have been the Federal Director of Public Prosecutions, Justice Gaudron, and the present New South Wales Director of Public Prosecutions—that there is a public figure test that varies in some respects from the test that might be applied in relation to crime involving other people, and also the traditional criminal matter. This was put strongly by one person who had been prosecuted as a result of that operation. Would you clarify for us what your views are about whether there is any distinction and, if so, what it is?

A: Yes. First, I do not think the people who say this have ever gone back and paid regard to what I said. What was said was in November 1989, as I recollect. It has been published; it is available for scrutiny and debate. In a sense it is now irrelevant because I am not a decision maker in the prosecution process. As I recollect what I said it is that in some circumstances it may be best to prosecute a high public official if a prima facie case can be made out, even if a conviction is not more likely than not, because if allegations have been made and are in the public arena, then if that high public official is to continue to discharge the duties of office, those allegations cannot remain unanswered. Take for instance a Commissioner of Police who is the subject of public allegations of theft. A charge has been laid against the Commissioner of Police of shoplifting, and it is in the public arena. A responsible prosecutor may decide to proceed with that case if there is a prima facie case notwithstanding that conviction is not more likely than not, which is the general test you will otherwise apply. To have the matter simply thrown out by the prosecutor and not determined by a court can have an absolutely crippling effect upon the individual's future. Most individuals in those circumstances will say, "Don't stop the prosecution. Let it roll", for just those reasons.

Q: I think it is an incredibly difficult call to invoke the public interest on that. In light of the matter last week it seemed to me—?

A: Let me break in and say that what I said has nothing to do with the ordinary working police officer, absolutely nothing. It is not that.

CHAIRMAN:

Q: Mr Temby is not now in a position to make the decisions that I think he meant earlier. Therefore I am wondering

about the relevance of the question.

MR TINK:

Q: Only that one assumes that from time to time certain matters are put up to the Director of Public Prosecutions for the purpose of prosecution. It seems to me that in that sense a general consideration of the matter is relevant. I have only one more question.

Q: To consider a hypothetical example, assume key detectives are charged with serious matters, such that in my view it would be difficult to categorise whether they are a minor or major police matter. Suppose the only evidence against them is that of someone who has a long record, and the evidence of that person would be enough, as I understand it, to establish a prima facie case. The call then is how much credence do you put on the evidence?

A: It is a perfectly simple case: you would not prosecute. I never prosecuted a case like that, and if I were the decision-maker I would never do so. It is perfectly simple. That is part of what we are investigating in the prisons matter. It will be reported upon in due course.

MR NAGLE:

Q: Mr Temby, is what you are saying that the higher the public image of people the more likely they should be prosecuted if an allegation is made against them? Is that what you are saying?

A: No, I am not saying that. That oversimplifies most grievously what I said.

Q: To be clear, what are you advocating?

A: As I just said: if there are allegations of serious criminality in the public arena against a high public official it may be the best course in the exercise of the undoubted prosecutorial discretion to proceed with the prosecution if there is a prima facie case, notwithstanding that the prospects of conviction are no better than equally poised.

Q: You are saying that a person in a high profile public office should not be given the same advantage that an ordinary citizen receives?

A: I reject that proposition. You cannot oversimplify it like that. I made a complex statement: you simplified it to two propositions. I will not accept that. It is not true.

Q: As a barrister practising in criminal matters I submitted a number of no bills. Some of those no bills were upheld and the prosecution did not proceed, basically because

although there may have been a prima facie case, on the totality of the evidence a jury properly instructed would not convict?

A: Of course.

Q: I am concerned that if an allegation is made against me as a public officer, a magistrate holds that there is a prima facie case, and a no bill is submitted to the Director of Public Prosecutions, because I am a public official in the public spotlight I would not have the same right as an ordinary citizen of having a no bill filed against me?

A: I do not believe that is true. I believe that I did more to bring rationality into the prosecution system in this country than anyone has done. At the time that I was the Federal Director of Public Prosecutions the Commonwealth had the best set of prosecution guidelines in Australia, or even in the common law world. I cannot be accused of not having been fair to individuals. We opened up the whole system in a staggering way. There is no unfairness to individuals involved. If the Commissioner of Police or the Premier is charged with an offence, and if there is a prima facie case—the matter can properly proceed; a jury could convict—the prosecutor should not decide not to proceed on the basis that it is a toss-up as to what the verdict would be. The right thing is to proceed and let the public official have the benefit of an acquittal. As I say, the public officials nearly always want that themselves.

CHAPTER SEVEN

PUBLIC STATEMENTS ABOUT COMPLAINTS

Questions on Notice

Q: 7 At the last public hearing with the Committee in March, Mr Temby outlined steps the Commission was taking to minimise the practice whereby complainants were making public statements, for political purposes, about matters they had brought to the Commission's attention. Mr Temby was particularly concerned that this practice had the potential to become a problem in a local government election year.

Q: 7.1 Now that the local government elections are over, is it possible to say whether the steps taken by the Commission were successful?

A: The steps taken by the Commission seemed to be generally successful, although there were statements made in the media shortly before the elections which the Commission considered inappropriate and so informed the makers of the statements and the media organisations which published them.

Q: 7.2 Is there anything more the Commission can do to further discourage this practice?

A: The Commission can repeat the message from time to time and take issue with individuals in cases which appear to warrant such action.

CHAPTER EIGHT

RESEARCH UNIT

Questions on Notice

Q: When Mr Temby appeared before the Committee in March he indicated that the Commission was in the process of establishing a small research unit.

Q: 8.1 Why did the Commission feel it necessary to establish its own research unit?

A: The Commission decided to establish a small research unit in order to enhance the Commission's capability for performing and evaluating its work in a thoughtful and analytical manner, to analyse and respond to trends and changes in corruption and to assist the corruption prevention, education and investigation staff to perform their functions as set out in s13 of the ICAC Act, particularly those related to recommending changes in laws and procedures.

Q: 8.2 What sort of work will the unit be doing?

A: A research manager of impressive qualifications and experience has just commenced employment with the Commission. She will as her first task prepare a proposed strategy for the research unit. To answer this question now would pre-empt that work.

Q: 8.3 Will the unit have any input into investigations?

A: The research unit may do work in support of or in conjunction with investigations.

Q: 8.4 Has the research unit done any work (as foreshadowed) on the application of aspects of the inquisitorial system of criminal justice to the Commission's hearings? If so, what conclusions have been reached?

A: A research fellow with expertise on the topic of inquisitorial systems has been engaged to provide the Commission with background information and advice as to how the Commission could pursue the project. That work is not yet to hand but should be received shortly.

CHAPTER NINE

PUBLIC EDUCATION

Questions on Notice

Q: 9.1 Would the Commission see any value in publishing a regular (eg. monthly) bulletin containing general information about what it is doing?

A: The Commission aims to make all its publications both interesting and informative. Publications are produced only when there is something worthwhile to say. The spread of its work, and the diversity of target audiences, has meant that the Commission has appeared in publications as diverse as the SES Bulletin, AG-QUIP Rural Mail and Truckin' Life. It aims to reach the whole community, not just the public sector.

The production of a regular bulletin has been previously considered. It did not proceed because of resource requirements. As well, maintaining a consistently high level of readership would be difficult because of the often specialised nature of the work of the Commission. What may be of interest to one reader, may not be of interest to another.

Rather, the Commission has decided to produce a bulletin like publication on an ad hoc basis. One such publication is currently being developed to publicise the Annual Report.

Questions Without Notice

MR NAGLE:

Q: I am also very interested in your education programs. How are they going, and what part of the funding from the overall budget goes to education? It seems that prevention sometimes is better than cure.

A: I can say that we place considerable importance upon the education function. Although the unit is small, it is comprised of young, active people who are always looking at ways of putting the message across. The report talks about a number of things that we have done, and I mentioned a couple earlier today. We are always looking for opportunities to get across the Commission's message. Where there are large gatherings of people we seek to be there.

We are in the course of our second public education campaign, aimed at people from a non-English speaking background who have special needs in this area. We do a lot of seminar work with the public sector. We will always make speakers available to any gathering of decent size anywhere in the State. As you would know from the Annual Report and from press reports, we are working with the Board of Secondary Studies so far as curriculum development is concerned. We think that in public education you get good value for money. A deal of it is not terribly expensive. For example, stands at the Royal Show are done basically from Commission resources. We have spent somewhere between $20,000 to $50,000 to get a good quality stand produced. We spend money on balloons, rubbers, rulers and pencils and all the stuff that people take away and keep getting the message from. You have seen material of that sort.

Q: I have.

A: We spend money on printing pamphlets—"19 Key Issues" and so on—expressed in simple language. I cannot tell you as I sit here just what part of the Commission's budget goes on education. That is a question I had better take under notice and provide information. It is probably best to provide that in fairly round terms for the completed financial year and for the current financial year—that is, figures for completed and some sort of budgetary estimate for what is coming up.

Q: The reason I raise it is because the Independent Commission Against Corruption has some mystique surrounding it that worries a lot of people within the bureaucracy who do not really understand the role of exactly what is corrupt conduct, and that is why you are having that education program. Recently a problem between a contractor and a government department was brought to my attention where there was a dispute over who was negligent in regard to the particular work that was done. The work went to mediation. The mediators resolved the conflict. The contractor did the work and then, as he went to get paid, it then went before an officer who threatened anyone if they mediated and resolved the problem with the contractor, he would take them all to the Independent Commission Against Corruption. Now the thing has gone to arbitration and will go to court. It is a lot of money.

The reason why people are listening to this more junior officer is because they are all frightened they are going to end up in an inquiry in the Independent Commission Against Corruption over this particular dispute. It is a problem facing many people in the bureaucracy on a day-to-day level.

The question that should be asked is whether they have told us about this. If they have not, their position is an impossible one. You might take back to those who are informing you that question, because if they are able to threaten to bring it to us, they must have a section 11 obligation. If they have brought it to us, we will treat it like everything else. The risk that there will be an investigation is statistically low.

Q: That is right, but, of course, these officers who are handling this are not sure about that, and that is the difficulty they have got.

A: But the really interesting question is, have we been told under section 11?

Q: No.

A: If we have not, their position is an impossible one. They must tell us. If they can threaten somebody with bringing it to us, they must tell us about it. We will very likely shrug and say, "Thank you for telling us; we are not interested".

Q: The person who brought it to my attention is one of the people being threatened.

A: Let him call the bluff. Let him tell us about it. They have nothing to lose. Finally, I do understand that there are those, particularly in the public sector, who look upon the Commission with some trepidation. I am not sure that is an entirely bad thing. I think that if we were considered to be simply cuddly, that would be a pity. You would not believe, however, from the reaction of the public that we are a feared organisation. We put up our stand and people flock in and talk to us. One in a hundred says, "You are wasting your time; you will never get anywhere". Another one in a hundred says, "You are probably crooked like the rest of them". The rest are very strongly supportive.

There might be some trepidation among some public sector employees, but there is not among the public; they are just supportive. Finally, one other thing: we have had some talks with the Labor Council. I addressed that body just a few months ago. We have started arranging for material to be made available and put in union publications. We are offering—I think we have done this already; we are certainly proposing to—to make speakers available for seminars that they might choose to organise, or organise on some joint basis with organisations, on the basis that we do not want the ordinary employees in departments and agencies to feel that all our attention is at top level. Perhaps we could be criticised for having put most of our resources in at top level to date. We are consciously moving down now.

Returning to an earlier question, the public education budget is about $330,000 per year, including salaries and other expenses.

Q: You are saying that the more that is done, the more it will increase?

A: I would expect that the proportion of expenditure on public education will tend to increase. The trend line is likely to be upwards, but that might not be literally true year by year. For example, the ethnic affairs campaign involves a lot of radio spots, which are not cheap. So you cannot be quite certain about that.

CHAPTER TEN

BALOG AND STAIT vs ICAC HIGH COURT DECISION

Questions on Notice

Q: 10.1 **Last year when the High Court made its decision in the case of Balog and Stait vs the ICAC the Commission expressed concern that its work would be unduly constrained by the decision. Did the ICAC (Amendment) Act 1990 fully resolve these concerns or do some concerns remain in relation to that decision?**

A: The 1990 amendments to the ICAC Act seem to have resolved the concerns arising from the decision in Balog and Stait vs ICAC, although there was some litigation after the proclamation of the amending Act. As there is still outstanding litigation in relation to the Commission's investigative and reporting powers (Cassell), it cannot be said whether there will be further problems.

CHAPTER ELEVEN

QUESTIONS ARISING FROM 1991 ANNUAL REPORT

Questions on Notice

Q: 11.1 **What action does the Commission intend taking in relation to authorities which appear to be providing too few reports about possible corrupt conduct under the provisions of s11 of the ICAC Act (pp 19-20)?**

A: The Commission intends to discuss this issue with authorities which seem to the Commission, having regard to their characteristics, to be providing too few reports. Perhaps some explanations will be forthcoming. Before the Commission can decide to take action it needs information on which to base a decision.

Q: 11.2 **Would the Commission support an amendment to s11 of the ICAC Act to simplify/clarify the definition of the "principal officer" of a public authority (p 22)?**

A: Yes, for the reasons stated in the Report.

Q: 11.3 **Would the Commission support an amendment to the State Owned Corporations Act 1989 to enable the Commission to exercise its powers to enter premises of State owned corporations under s23 of the ICAC ^Act (p 25)?**

A: Section 36(2) of the State Owned Corporations Act 1989 provides that State owned corporations and their subsidiaries are public authorities for the purposes of the ICAC Act and directors, officers and employees of State owned corporations or their subsidiaries are public officials for the purpose of the ICAC Act but excludes the operation of s23 of the ICAC Act relative to such corporations, subsidiaries and persons. Parliament obviously had a reason for passing such a provision. The Commission was informed of the proposed bill. It did not offer any objection to the proposed s36(2). Since the Act was passed in September 1989 the Commission has not experienced any situation which calls for an amendment to s36(2).

Q: 11.4 **On page 47 of the report it is noted that "a brief of evidence for fraud-related offences was referred to the Director of Public Prosecutions on 6 February 1991. As at 30 June 1991 the Director's response was awaited." Is this considered to be an unreasonable delay?**

A: The Commission received advice from the Director of Public Prosecutions that charges should be laid, by letter dated 19 September 1991. This seemed longer than desirable even though there was a large amount of material to be considered. However, that material was well organised, in admissible form, of a repetitive nature and Commission officers provided assistance to DPP solicitors as to how to best tackle the material.

Q: 11.5 On pages 47 and 48 it is noted that investigation no 21 concerning the NSW Film Corporation which commenced on 8 June 1990, was still current as at 30 June 1991. Is this not an unusually lengthy investigation, in comparison to other Commission investigations? Why has it taken so long for this matter to be resolved?

A: Yes. This matter involved witnesses who were overseas, (and therefore beyond the Commission's jurisdiction) and unco-operative. Witnesses have now been located and interviewed overseas, and a report will be prepared.

Q: 11.6 In what ways are statements taken by the Commission in the course of investigations different from those prepared for court (p 70)?

A: Statements for Commission investigations differ from statements prepared for court in that they do not contain the formalities required by Part IV of the Justices Act 1902 and, because the rules of evidence do not apply to Commission hearings, they may contain material which would be inadmissible in courts.

Q: 11.7 Why are no details provided in this year's Annual Report of public opinion surveys conducted by the Commission (p 89)?

A: The current series of public attitude surveys is not yet complete. A third and final survey is to be conducted in December. As stated in last year's Annual Report, details of completed surveys will be included in Annual Reports. The Annual Report to 30 June 1992 will include details of the current series of surveys.

Q: 11.8 On page 104 of the report it is stated that the Commission is subject to the normal budgeting process including "compliance with productivity offsets". However, the budget papers indicate that the Commission's budget will increase by $2 million or 16% in 1991/92. Could you please explain in what way the Commission is subject to productivity offsets?

A: The Treasury defines productivity offsets or productivity savings as a 'reduction in expenditure achieved through increased efficiency while maintaining service levels'. These savings were introduced in the 1988/89 financial year

and have been in force ever since. This financial year's saving is 1.5% of the Commission's recurrent budget. These savings apply to all inner budget sector departments and authorities.

This year the Commission's budget increased for the following reasons:

- an increase to bring staffing up to maximum operational level;
- the conversion from a cash accounting to an accrual accounting basis. Accrual accounting, unlike cash accounting, makes provision for such things as superannuation, long service leave payments and the depreciation of assets; and
- an increase over the previous year to provide for inflation.

After allowing for increased staffing and a change to accrual accounting, the Commission's budget has effectively increased by 7%, which is in line with increases granted to other inner budget sector organisations. This is as between the appropriation for the 90/91 financial year and the 91/92 financial year.

Q: 11.9 Why will there be "a need for a deal more (overseas) travel in 1991/92" (p 105)?

A: Two senior officers have been to California since July 1991. Two representatives will attend the International Anti-Corruption Conference in Holland in March 1992. Further travel is likely to be required in connection with the study of inquisitorial systems in Europe.

Q: 11.10 In the interests of accountability, should the Commission be subject to the provisions of the Public Sector Management (Stores and Services) Regulation 1988 (p 106)?

A: When announcing the creation of the Independent Commission Against Corruption the Premier stated:

> *"The proposed Independent Commission Against Corruption would be responsible to Parliament, and not to the Executive Government. The independence of the Commission and its responsibility to Parliament is constituted in a number of ways. In exercising functions and powers under the legislation the Commission is not subject to direction and control by the Executive Government."*

and also that:

"The Commission will not be subject to public service legislation.".

The reasons for this are obvious. The Commission must be, and be seen, to be independent of the government of the day. It is for this reason that the Commission must be able to determine for itself the way in which it works.

As a point of principle the Commission should not, to the extent practicable, utilise the services of organisations it may investigate. To do so may compromise the integrity of the Commission.

Nevertheless, the Commission generally follows the provisions of the Regulation.

Q: 11.11 **The costing of completed investigations is a major initiative and strongly supported (p 116). Is it possible to make the figures even more meaningful by providing some sort of comparative measure of the significance/importance of each investigation?**

A: The Commission recognises that costs are not the only measure of investigations. In developing evaluation mechanisms, the Commission will seek to evaluate the effectiveness of investigations in a corresponding manner and to the extent practicable.

Q: 11.12 **The Commission made significant savings by using Crown Prosecutors in lieu of outside counsel during 1990/91 (pp 142-143). Is this practice likely to continue? In retrospect, would it have been more appropriate to have used in house counsel during some early inquiries (such as the North Coast inquiry) in which significant fees were incurred by the use of outside counsel?**

A: Yes. The Commission's present arrangement with the Director of Public Prosecutions, is that secondment of Crown Prosecutors to perform the role of General Counsel, for six or nine months at a time, will continue. General Counsel including seconded Crown Prosecutors have a broader role than simply appearing as counsel assisting in Commission hearings, although that is one of their functions.

No. Some matters require the use of outside counsel, because in house counsel are otherwise fully committed, or because a matter will be long or complex and require exclusive attention, which in house counsel cannot provide, given the other duties of the position. The North Coast investigation was too large and complex for one counsel.

Q: 11.13 **Could some details by provided on the work carried out for the Commission by the following consultants (pp 146-147)?**

- **V A Anderson and Associates** : Operational advice.
- **Michael J Dever and Associates** : Security vetting.
- **W Flemming** : Preparing some operational procedures.
- **Privacy Committee** : Preparation of a submission in relation to the investigation into the release of confidential Government information.

Questions Without Notice

Authorities providing too few s.11 reports

MR GAUDRY:

Q: If we can go to the report section, of particular interest is the fact that you state, Commissioner, that there are authorities providing too few reports under section 11. Would you be able to expand that with the names of organisations that you think should be giving more thorough and frequent reports to the Commission?

A: I am very happy to expand upon it although, if permitted to do so, I would prefer not to name agencies because we would like to approach them first. I have to say that we are proceeding only by way of impression because we do not know what we should have got that we have not got, and that is really in the nature of things. But inevitably any organisation of significant size, if it has officers exercising discretionary judgments or if it is handling money and public property, may be exposed to corrupt influences. That is the first proposition. Second, section 11 requires that reports be provided not where corruption has occurred but where the chief executive suspects on reasonable grounds that corrupt conduct may have occurred. Obviously the breadth of section 11 is very extensive. The third point is that we have provided guidelines which will facilitate the setting up of internal reporting procedures so that matters do in fact come to the attention of the chief executive.

The fourth point is that some agencies—and the RTA is high on the list—provide us with reports frequently. I do not have the view that the RTA today is in any sense a corrupt organisation. I think they have worked hard to get corrupt influences out of their organisation and they have been largely successful in doing so. Of course, the consciousness of the RTA has been raised by the

investigation we did and, of course, they are blessed with a chief executive who has an active approach and cares about these areas. It is not difficult to think of other agencies of size, the officers of which are exercising discretionary judgments, all of which look after a lot of public property or money. The reports we get from them are not 40 or 50 a year, and in some cases not even four or five a year, and we just have the strong impression that they are not giving us reports in a timely manner, or at all, as section 11 requires. The Annual Report is the first step in a campaign to try to get them to lift their game. A second step will be to work out how, by way of survey or otherwise, we can raise the consciousness of other agencies. A third step will or may include correspondence or visits from Commission officers or contact between myself and chief executives to try to ensure that they understand what their obligations are. If permitted, I would prefer not to name those that I think we are going to have to do some work on because I am working only from impressions. It seems there is a disparity in the numbers and we want to raise consciousness.

Q: Given that you have given out guidelines, does it indicate a need for an increase in the corruption prevention department that you have to make greater contact. You did suggest perhaps that the Committee itself might become involved in checking whether those guidelines are followed. Would that not be more appropriately the role of your own Commission?

A: With respect, I was not suggesting that the Committee become involved in seeing whether the guidelines are being obeyed. That is something we should do. The suggestion rather is that the Committee might become involved in seeing to what extent our corruption prevention projects have been successfully acted upon. The corruption prevention department is still small but in the last 12 months it has something like doubled in value and its capacity is accordingly significantly greater than it was. I do not doubt we can do what is necessary. Mind you, I do not doubt we will never achieve the happy situation in which section 11 is perfectly obeyed. The natural human inclination is not to tell us about things, despite the statute, until it is thought we are about to find out about it. We are not going to achieve perfection but I am sure they can do better than they are doing.

MR TURNER:

Q: Is there any need for us to look at that section?

A: I do not think there is. It is broad in its scope. If you were going to change it, you would have to change it by way of putting in a penalty. That just creates another offence and we would probably all agree there are too many offences. It is hard to see them being prosecuted. I

think it is best if we just push for better compliance.

MR GAUDRY:

Q: You say there is some difficulty in the principal officer definition. Should that perhaps be tightened up to have a statutory person in charge of internal audit and report?

A: There is a difficulty with the definition of he who is obliged to report. That should be fixed but that would be by way of clarifying who is the chief executive and obliged to report rather than shifting the obligation down the line. It is very important that chief executives should see themselves as having prime responsibility. Accordingly, we always say that the head of internal audit must report direct to the chief executive. It really has to be the chief executive. You cannot delegate integrity.

MS BURNSWOODS:

Q: Would it be useful if there was a clause in relation to the Annual Reports of departments and authorities that they had to actually say whether they had made any section 11 reports, so that it would be one of the range of things that are expected to be briefly reported under the Annual Reports Acts?

A: Yes. I have to confess that I have not thought of that. My immediate reaction is, yes, it is a useful suggestion.

Q: I take your point about offences and penalties but given the range of matters that are in the reports of authorities and departments, it could perhaps be a reminder?

A: That is, with respect, a useful suggestion. It might be that even there you do not need a statutory amendment. It could be done by government direction. Let us keep as much out of the statute as possible.

Productivity Savings

MR GAUDRY:

Q: In section 11.8 of the answers, in terms of productivity increases, you explain that the Commission is still reaching its operational potential and therefore there is an increase in the budget allocation, but that does not answer the question in terms of productivity offsets themselves?

A: What we were trying to say was we did lose the 1.5 per cent productivity saving. That was taken off, but we had added on allowances related to staffing and inflation, and the figures were also affected by the change to accrual accounting.

Q: What sort of areas of operation have you made those productivity cuts in?

A: Speaking very plainly, what it means is that you get less than inflationary and other pressures would dictate is appropriate and you have to become more efficient. We fought very hard to resist the notion of productivity savings on the basis that in theory they are not available to a new organisation. They are available to a 50-year-old organisation that has become moribund, because there are always things they are doing that they do not have to do. But we were new and we have not had time to become moribund and therefore productivity savings were silly in our case—were and are silly. However, the Government said, no, it applies to you as it does to everyone else. We just had to accept it.

Q: But it is at a cost?

A: Everything is at a cost. I come back to your suggestion that we should increase the corruption prevention department. Yes, that would be desirable but if we did that, before you could blink we would be an organisation of 200 people. There are always more operational demands. I do not want to get bigger than we are.

Counsel Fees

MR GAUDRY:

Q: I might return if I could to 11.12 which concerns the North Coast inquiry and its cost in terms of consultants' fees or counsels' fees really and ask if perhaps it would have been possible to second a number of prosecutors to carry out that particular operation and whether that would be a practice that could be undertaken?

A: Mr Blanch has been pleased to make available a Crown prosecutor on a continuing basis. I have not approached him to seek more than one and I do not propose to do so. I am quite certain that the big investigations could not be done effectively in that manner. We are using not just outside counsel but, indeed, teams of outside counsel. At least one of the current investigations, the prisons matter, I have senior and junior counsel assisting me. We are making quite remarkable progress, not just in the sense of getting through the job but really in finding out what has happened and what is wrong with the present system. It could not be done without the very best and the money spent is very worthwhile. We are going through three witnesses a day on that matter. We are finishing a segment every five days. You cannot do it without the best assistance. They are worth the money.

Commission Findings

MR TURNER:

Q: I will qualify my question by saying it comes back to guilt and innocence and the determination of the Commission. In the Report at (vii) you make your statement that you are not concerned with guilt or innocence. On page 5 clause (5)(a) it is stated, "findings that particular persons have engaged, are engaged or about to engage in corrupt conduct;". In the second last paragraph, it is stated "to amount to corrupt conduct, conduct must constitute or involve a criminal or disciplinary offence, or reasonable grounds for dismissing a public official or dispensing with that person's services.". I have some difficulty again in defining corrupt conduct which has to be found on the basis that it may constitute a conduct involving criminal activity, whether we are not giving de facto findings of guilt and innocence to your Commission by the wording of that section in your comments about guilt or innocence?

A: If the matter was as you last put it, which is to say corrupt conduct had to involve a criminal offence, you would be right. But it does not because it can also be constituted by conduct which merely involves discipline. That is not a notion of criminal guilt. The second comment I would make is that we do not use the word guilty in investigation reports with alacrity. I do not want to go so far as to say that we have never used it or never will because I cannot be absolutely certain about that, but it is a word which is largely avoided because we do not want to confuse our role with the courts.

Q: The words guilt or innocence you have taken then as being in the legal sense—I think if you find there could be a disciplinary offence or reasonable grounds for dismissal in the broad sense of guilt or innocence, that could be applied in that case?

A: So it could, but it is others who are going to have to do that. We are going to try to avoid doing that. We do not talk about innocence either, although one might on occasions use a word like exonerate in circumstances where somebody has been charged with something is clearly blameless. One does get instances like that.

Q: As a tangential matter do you ever make comment that there is a finding of no corrupt conduct?

A: We certainly do.

Q: For a specific person?

A: We have produced reports that say that. We have produced reports that say we have conducted hearings and there is nothing in this. They tend to be pretty short reports. Randwick College of Technical and Further Education was one but there are others; such as the Hakim matter. I do not like the word "cleared" but that is a report which said there is no cause for public concern. We had a hearing in Coffs Harbour last week. There was an allegation against the shire engineer who was said to be trying to shift the sewerage works because he and his brother owned a large tract of land next door, which would be increased in value by millions of dollars. The Commission investigated. We called the shire engineer and the shire president. In due course of time the report will utterly exonerate the shire engineer who has no interest in the land and does not like his brother, nor does his brother like him. There is just nothing in it. But we think that is a useful public purpose because around the district it has become a preceived truth. We think it is important to say that there is nothing in this.

Q: That is the current hearing on conflicts of interest, I presume?

A: Yes.

Q: Is that conflicts of interest for an academic purpose, or are you actually looking for corrupt conduct while you are going along through that inquiry?

A: Well we are looking for corrupt conduct because the statute requires us to, that is to say if we have an investigation under way and we are conducting a hearing, then we have to look for corrupt conduct. But the case studies we are running are being pushed through at a rather more rapid rate than is typical in most of our investigations. The prime purpose is to try to ascertain the sorts of difficulties that have arisen or may arise and how they have been dealt with. Our prime purpose is to process change, to try to achieve, probably principally through legislative change by way of recommendation, a better way of handling conflict problems at local government level than presently happens.

Determinations of Director of Public Prosecutions

MR TURNER:

Q: I think the last time you came to see us we mentioned it was recommended that charges proceed against—sorry, a matter was referred to the Director of Public Prosecutions, that where matters did not proceed through the Director of Public Prosecutions there be a statement in the Annual Report. As to the North Coast inquiry there were certain matters that did not proceed. I may be mistaken, it may

have been referred to in another report earlier but I do not see any statement in this report of where matters did not proceed that were referred to the Director of Public Prosecutions. I refer specifically to the Beck and Page matters?

A: As you were asking me the question I was not mindful of anything that came into that category.

Q: I am certainly prepared to check?

A: I am not disputing what you say nor am I quite certain when those decisions were made but they were probably made during this reporting year, and accordingly to the extent the suggestion is a good one, I think it is one we should have taken up this time around. I think it continues to be a good suggestion. I think it is something we probably should have done. We will make note of it.

[Refer also to Appendix One, page 74]

Provision of Information Directly to Authorities

Q: On pages 67 and 68 you suggest that section 14(2) be amended to permit the Commission to provide information to some public authorities, such as councils, directly rather than through the Minister. I have some difficulty with that finding bearing in mind the Westminster principle under which we act. Could you expand on that?

A: This really started not in the local government context but rather in relation to prosecutions. The Act presently requires that we provide information to the State Attorney-General who then has to pass it on. On an occasion when we did that there were discussions between the then Attorney and myself. It was quickly agreed that this was inefficient because the process would take some time and he really was not interested. Accordingly, it was agreed that the way to do it was for us to provide the information direct with a courtesy copy to him so that he would know what was happening. We have simply sought to extend that principle to local government. I suppose you can debate for a long time the extent to which councils are autonomous, as against State Government, but certainly councils have a standing as against the Minister for Local Government different from the Minister's own department. That is the explanation for what is contained in the Annual Report.

Q: The Minister still does administer the Act, does he not?

A: And we do not mind providing information to the Minister. But as we are a statutory organisation with certain specific responsibilities in relation to councils, as the Minister has a more general oversighting function, it does

seem to us best that we should be having our dealing direct with councils rather than through the Minister. I cannot take it further: they are the reasons.

MR NAGLE:

Q: In regard to local government, what things do you perceive passing the Minister to go directly to local government councils?

A: The examples are actually quite mundane.

CHAIRMAN:

Q: That question was dealt with earlier?

A: Mr Nagle just wanted an example. I do not mind giving an example: it is quite mundane. We commenced an investigation which resulted in a charge being laid against a rubbish collector who had been charging restaurants to take their rubbish away and thus getting something on top of his salary. We received a bit of criticism for that but we did it because we judged that it was conduct unlikely to be confined to that single individual. That is clearly unacceptable conduct. He was successfully prosecuted and his services were terminated. Council wanted what we had done or the fruits of what we had done for the purpose of proceedings before an industrial tribunal. We would like to be in a position to simply provide that direct rather than through the Minister. No policy question was involved; it was just a matter of some information. That is a good mundane example. I am reminded that they asked at short notice, and if we had not been on the ball, it probably would have gone through the Minister and it would not have been useful to them.

Advice to Government Organisations

MR TURNER:

Q: On pages 76 and 77 you have noted your advice given to government organisations. You refer to the telecommunications unit and you say that with one or two suggested changes the progress was regarded as an excellent model for ensuring fair and equitable comparison of bids. Generally in that area where does the expertise come from within your organisation to determine what is an excellent model or to construct a model?

A: Our corruption prevention people.

Q: Where do they draw their expertise from?

A: They have varied backgrounds. They have learned a lot on the job in the last year or so. There is no claim to

infallibility there.

Operational Training Programs

Q: On page 100 you say that there was an 11 week operational training program to give the skills necessary to undertake the work. Again, who would run that sort of operational training program?

A: The last program was put together by a man named Kelly who ran the AFP staff college, I think it was called, in Canberra. He was a very senior officer. If he was not an Assistant Commissioner when he left, he was only one rung down from there—a very senior officer and very highly trained in training. I am not sure who will be doing it the next time around but we get quality. For example, we had a man called Bill Fleming, who retired from the New South Wales Police Service as an Assistant Commissioner helping us with the preparation of operational procedures. We do go for quality.

Delay to Prosecution

MR NAGLE:

Q: Can I go back to page 48 of your report, investigation No. 27. By the way, the man was not the mayor of the Council; he was the former mayor. He was an alderman on the Council at the time this occurred. It concerns me that there was a prima facie case believed by the Commission. It went to the Director of Public Prosecutions and the DPP did not proceed. Before you answer the question, the reason why I mention this is because I hold the dubious position of being the only alderman in the history of this State to be prosecuted under that provision of the ordinance when I was an alderman on the Council and the resolution to prosecute me was moved by the very same man this relates to. I was just wondering why there was a difference between why I was prosecuted and he was able to get away with it?

A: Because the Office of the Director of Public Prosecutions dropped the ball. I was concerned. Concerned is a very modest and seemly word to describe how I felt when that prosecution was not commenced. We gave them the papers in time and they did not commence the prosecution in time, or they did not give us advice in time.

Q: The then mayor and some of the other aldermen came to see me, and they were concerned about what had happened as well.

A: They know we were concerned, too. We have told them so. It was an appalling state of affairs. Luckily, it is the only occasion on which it has happened.

Q: Are there any procedures now on track to make sure that it does not happen again because of the six months' statute of limitations that applies to these types of offences?

A: The answer is not to change statutory limitations, because you have got to have them. The answer is to make sure that officers do their jobs properly. Mr Blanch was at least as concerned as you or I are, because it happened in his own backyard.

Q: You were talking about training, and you mentioned the word fallibility and also that there are insiders who may or may not be directly involved in corrupt conduct or conduct requiring disciplinary procedures. Would it not be helpful in your training procedures to institute some type of mediation where people who are servants, who are not directly involved but who are ancillary to what has occurred, could be mediated into giving voluntary evidence instead of having to be compelled to give evidence? The reason I raise that is because of the stress and concern to people who do not know the outcome of a procedure yet believe themselves to be innocent.

A: I am sorry, I do not quite follow what is being put to me.

Q: It is like counselling. Would it be better to counsel people who are not directly involved in the actual corrupt conduct but who are ancillary to it to the extent to which they may have had control over files; they should have supervised what was going on but they failed to do so, yet they are brought in and are there to be examined and cross-examined, and they are very hesitant about giving evidence, and giving truthful evidence as they are being cross-examined, because they feel that maybe ultimately they might be involved in it even though they feel they are innocent?

A: Yes, I follow. When we can we simply obtain statements, which are then tendered, and we do not call witnesses simply for the pleasure of seeing them grilled or seeing what might come out of it. What you are talking about is the sort of situation where, if we think we responsibly can, we will try to get through by means of a statement.

If I can expand and move perhaps away from the topic, we do a lot of work with those around those who are investigated to try to make sure they get the message. The best example of that is the Commercial Services Group. You would be aware that we did that exercise in relation to Vinyl Floor Products. Speaking with due modesty as the one who wrote the report, I thought it was a useful report, and it has a considerable capacity for teaching purposes. We started that process, as I think the Annual Report mentions. We have conducted a couple of training seminars, working with CSG. We got all their buyers in and the supervisors of the buyers and talked through the issues that the report gave

rise to. I am informed it was a very lively discussion indeed. It is clear enough that there had not been a positive relationship between the buyers and their supervisors, and significant beneficial results are already flowing.

Use of Commission Transcript in Prosecutions

(Refer also to Mr Temby's Opening Statement, pages 7 & 8)

MR TURNER:

Q: On pages 70 and 71 you touched on the use of Commission transcripts and court proceedings in your opening address. In the nuts and bolts of that, you referred to the word "editing", which frightens me a little. How would the editing be done? Would the witness have an oversighting arrangement with his legal counsel in relation to that? Would they sign the documentation after it has been edited?

A: The way I would see it being done is for us to provide to everyone an entire transcript. That would leave no room for the suggestion that we had inappropriately edited. We would provide in lieu of the statements transcripts which had chopped out all the stuff that did not matter for prosecution purposes—and, importantly, evidence that was inadmissible. I am not suggesting that we should be holding anything back from anyone. It is just a matter of trying to find a better and more efficient and effective way of getting prosecutions off the ground than having to go to witnesses who do not want to know. It is necessary to understand that our work is different from dealing with traditional crime. With traditional crime most of the witnesses have seen something or heard something and they are happy to help. In the fraud and corruption areas most of the witnesses are actually insiders. They do not want to help; they want to hinder. It is a very difficult thing and it can become quite impossible if you have to make people sign statements. You cannot make them. If they will not sign a statement you cannot prosecute. It is just silly.

Q: So you are still supposing that you virtually have the right to edit whatever you like and if the witness does not particularly like your edited transcript it could go forward anyway as a statement?

A: Yes, I do say that. But I am not going to hold anything back. Everyone can have the entire transcript. Everyone can know exactly what happened before us. We would convert the transcript into a document that contained what was or seemed to be the admissible evidence for prosecution purposes. The police do very much the same thing. In a large matter the police will typically sit down, debrief, make notes, take statements and all the rest of it. Then

they will produce a document which the witness signs for prosecution purposes. That is not everything they have taken from the witness; it is what seems to matter. We would do the same thing.

Q: One difference will be that your final document would go forward without the witness's signature, and that is a fundamental difference?

A: Yes. The witness would have sworn to it, though.

Q: But you will have edited a sworn statement?

A: With respect, as long as we are making the transcript freely available to everyone without any editing there can be no possible harm.

Q: It just concerns me. I can see where you are going with it. It concerns me that you are taking a stance in which you will determine what evidence goes forward. Admittedly, the other side will have a transcript and presumably can challenge that at the appropriate time?

A: They do not have to, because the witness then goes along and gives evidence. Lawyers play games about statements and stuff like that. It does not matter. The witness at a prosecution will give evidence. That is what matters. It is the evidence that will matter, not how we have edited. That does not matter.

Q: It does concern me that there is some editing going on?

A: There is not an editing going on, let me stress. We have to get a change to the process.

Q: It is proposed that an editing go on?

A: Yes.

MR TINK:

Q: On the editing provision concerning transcripts so they can be admissible, as I understand it you would start out with a transcript of evidence in the Commission which, for example, might be of a witness given over his objection to giving evidence. That is a possibility. As I understand it, under section 26 *(correction - section 37)*, a witness can refuse to give evidence on a basis that allows it to be used in court later?

A: That is right.

Q: And there is the other provision in section 17 that basically says that the rules of evidence do not apply to proceedings before the ICAC. You may then end up in the context of a hearing with transcript which is given over

objection and which may, for example, contain lengthy slabs of hearsay and or material which in any one of a number of ways might not be admissible, say, under the law of the current Evidence Act. How are those matters to be approached under the proposals of yours in relation to what goes forward to a magistrate hearing a committal?

A: Let me start by going back a number of years before we had the present provisions about the documentation that was to be provided in a prosecution context. If you go back a couple of decades there were not what are called paper committals, which we have in a rudimentary way in this State and in a more developed way elsewhere. There would be a charge laid. At committal the prosecution would call witnesses who would give evidence. There could be objections taken on the grounds of inadmissibility, lack of relevance and so on. If there was a committal, then the same process would be undertaken leading to the trial. The committal transcript, if you could call it that, formed the base of the papers for the subsequent trial.

Subsequently the law was changed so as to require when a charge of an indictable offence was laid, that the prosecution should provide statements in a particular form. That gave rise to no special difficulties, at least so far as traditional crime is concerned and, so far as I am aware, so far as police operations are concerned. Indeed, I would think that significant benefits flowed from that because in the course of taking statements for the purposes of a police investigation, they would be taken in a particular form. As we have sought to explain in the Annual Report, because our focus is broader because we do not know what the end of the investigation process is going to be because the hearing is a part of the investigation process, it is simply not practicable to obtain statements in an admissible form at the early stages. We do not know what crime we are investigating until the end, quite often. Accordingly we get not statements in a particular form but Commission transcript.

If a witness objects to answering questions, then the answers given cannot be used against that person but the answers given can be relied upon as against other individuals. To take an example, Mr Reid, who was the main witness in the Sutherland Licensing Police matter, the publican, objected to answering questions. I think he was the recipient of a section 38 declaration on the basis that his answers could not be used against him. His testimony is critical as against a police officer who it is considered by the prosecuting authorities should be prosecuted. Reid does not want to sign a statement, for which I do not particularly blame him given what he has had to undergo already. The question is where do we go from here? Our answer is to say that if the law was changed, that the transcript could be used subject to deletions. You would not have to make deletions on the ground that

there had been an objection because you could not use the objected to evidence against the individual in any event. You would be taking out of the transcript material that was irrelevant for prosecution purposes.

Q: You say irrelevant. What about inadmissible in the ordinary course of a prosecution?

A: Yes and inadmissible material.

Q: And the framework for that would be what, a series of objections taken by people represented at the committal or a round table conference?

A: No, we would not do it. We do not run the prosecutions. The prosecutors in circumstances where it was not practicable to obtain a statement would take out of the transcript what was needed for prosecution purposes. That just becomes part of the paperwork. It is not evidence. It is just paperwork and at the committal hearing, if the defence want it and at the trial necessarily the witness appears to produce evidence. Debate about whether the process of utilising the transcript for these purposes has been done perfectly well, moderately well or badly does not affect the strength of the evidence the witness gives; that has to be given live.

Q: But one assumes that there is paperwork floating around upon which, at the very least, cross-examination might be based at some point?

A: Including our transcript.

Q: Well, including relevant parts of it, one assumes, that can properly be put under the laws of evidence?

A: Well, there could well be stuff in the transcript which the prosecution would not need or seek to rely on for its purposes. That could be used for prosecution purposes. That is fine. I cannot detect a civil liberties issue here. I cannot see how you could not put a regime in place that was not perfectly fair to individual accused persons. It is just one about process; it is just one about getting the job done.

MR NAGLE:

Q: Just going back to this issue in regards to the court procedures. As a barrister you are aware that juries tend to rely on things which are tangible and which are before them, such as written documents, statements, material; if it is a murder trial, clothing and if it is a drug trial, the drugs; that which is tendered as an exhibit. Is it the understanding from everything you have said that you would want the edited transcripts of the proceedings before your Commission which are in admissible form to be tendered to

the jury so the jury has it before them?

A: Certainly not as a general rule.

Q: When would you have exceptions?

A: Let me make clear that statements of witnesses are almost never tendered.

Q: That is right?

A: I am certainly not contemplating that. The only exception would be in a perjury-type prosecution when you would need to establish just what they had said which was said to be wilfully false. That is exactly what you would do if you were bringing perjury proceedings arising out of a court hearing. In those circumstances it would be necessary to strictly prove just what was said, which would be done by normally proving the transcript, but that is a very special case.

Q: But is that not the situation today, that if there is a perjury trial and someone has given perjured evidence on a previous occasion and they are brought before the court on that charge, to prove the charge you have to prove that they gave that evidence under oath previously?

A: Certainly.

Q: And therefore there is legislation already on foot to allow the tendering of that part of the transcript?

A: So there is. I am just answering your question. I am not suggesting any change that would be visible at the trial process, and certainly not suggesting that our transcripts go into evidence. That would be quite wrong.

Q: In committal proceedings at present when there is a discrepancy between evidence given before a magistrate and evidence given at a trial, usually counsel takes the transcript and brings it to the attention of the witnesses to say that on a previous occasion, and then there is that list of preliminaries that you do to get your point over, but the transcript is never tendered so you do not advocate the tendering at the trial before the jury?

A: No, certainly not and I am saying nothing about admissibility of what we happen to hear. That is the most fundamental point. I am not suggesting a change to the law of evidence. I am suggesting a small procedural change.

MR TINK:

Q: In relation to the suggested proposed amendments to the Justices Act, they would be amendments I assume to subdivision 7A of the Justices Act to allow written

statements in the form you propose, would they?

A: I am informed that the answer is, yes. I have not studied this issue closely enough to be able to pretend that I am well acquainted with that Act. I am informed that the answer is, yes.

Q: The proposal is that that type of statement go forward as a primary document in committal proceedings, is it not?

A: I do not know what "primary document" means, with respect. It is proposed that it should go forward as a substitute for the statements that are presently mandatory.

Q: A document that is used by the magistrate to determine whether or not the matter should go to a jury, subject to a right of cross-examination by counsel for an interested party who might be sent to a jury?

A: That would be true. If the defence chose not to have the witness in for the giving of evidence, then yes that would be right.

Q: I am not sure how this operates either but I assume that having the witness in for cross-examination would be having the witness in to be asked questions and to give evidence on the basis of the document that would be put up in the form that you suggest?

A: No, that is not how it works. The prosecution puts up a statement. If a witness is cross-examined, the witness can be cross-examined on the basis of any material that is relevant. The defence does not have to adopt the slant that is contained in the statement, no more than the defence would have to adopt the slant contained in our transcript.

Q: No, but the statement from the Independent Commission Against Corruption in that form is one of the documents that is in the arena, so to speak, with others that become the subject of questions?

A: Yes, it could certainly. But in the end there has got to be a trial in which witnesses get into the witness box, are sworn or affirmed and give evidence.

Q: That is one option. Another option is that the matter goes out at the committal stage, in which case the magistrate will have made a decision that the matter not proceed further?

A: There cannot be a conviction without a witness giving live evidence. At which stage, what is in the transcript or statement does not matter much. They have got to give live evidence. They have to persuade a jury.

APPENDIX ONE

Letter from the Solicitor to the Commission,
dated 21 October 1991, concerning determinations of
the Director of Public Prosecutions

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

21 October 1991

Mr David Blunt
Project Officer
Committee on the ICAC
121 Macquarie Street
SYDNEY NSW 2001

Dear Mr Blunt

When the Commissioner appeared before the Committee on 14 October 1991 Mr Turner pointed out that the Commission had not included in its 1991 Annual Report statements about certain people who had been the subject of statements in investigation reports that consideration should be given to prosecution of them, where decisions had been made to not commence prosecutions. This course of action had been discussed when the Commissioner appeared before the Committee on 15 October 1990.

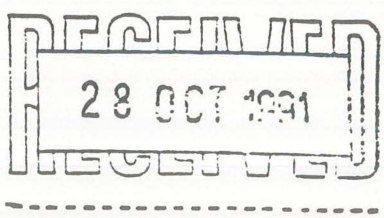
The Commission now asks that the Committee consider publishing in the collation of the Commissioner's evidence this letter, which will update the record in respect of persons named in the North Coast Land Development Report, as follows.

On 24 July 1990 the Director of Public Prosecutions decided that no prosecution action should be taken against John Bolster, Donald Page, Donald Beck, Christopher Lomax, Angus Pearson, Dawn Pearson, and Gary McAuliffe, each of whom had been the subject of a statement in the North Coast Land Development Report that consideration should be given to his or her prosecution.

Yours faithfully

[redacted]

Deborah Sweeney
Solicitor to the Commission



ALL CORRESPONDENCE TO: COMMISSION SECRETARY BOX 500 GPO SYDNEY 2001. DX 557
CNR CLEVELAND & GEORGE STREETS REDFERN NSW 2016 TELEPHONE (02) 318 5999 FACSIMILE (02) 699 8067